Supreme Court, U.S.
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No.

IN THE

Supreme Court Of The United States

PATRICK J. SIKORSKI,
Petitioner

v.

OKEMO MOUNTAIN, INC.
SALMON & NOSTRAND
RICHARD P. COUTANT,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Federal Rule of Civil Procedure 50(a)(1) provides:

> If a party has been fully heard on *an issue* during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on *that issue*, the court may: (A) resolve *the issue* against the party; and (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on *that issue*.

(Emphasis added).

The question presented by this petition is:

Whether a party is deprived of his constitutional right to a jury trial and due process when a court reviewing the sufficiency of evidence pursuant to Rule 50 modifies the question upon which the jury rendered its verdict and enters judgment upon that modified question.

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STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit, affirming in part, reversing in part, remanding in part, vacating in part and dismissing in part the decision of the district court, was handed down on December 19, 2008. Pet. App. 40a. A timely petition for rehearing was denied on March 17, 2009. Pet. App. 47a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

U.S. Const., amend. V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., amend. VII.

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Fed. R. Civ. P. 50

(a) JUDGMENT AS A MATTER OF LAW.

(1) *In General.* If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) *Motion.* A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) RENEWING THE MOTION AFTER TRIAL; ALTERNATIVE MOTION FOR A NEW TRIAL. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 10 days after the entry of judgment – or if the motion addresses a jury issue not decided by a verdict, no later than 10 days after the jury was discharged – the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule

59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.

(c) GRANTING THE RENEWED MOTION; CONDITIONAL RULING ON A MOTION FOR A NEW TRIAL.

(1) *In General.* If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial.

(2) *Effect of a Conditional Ruling.* Conditionally granting the motion for a new trial does not affect the judgment's finality; if the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case must proceed as the appellate court orders.

(d) TIME FOR A LOSING PARTY'S NEW-TRIAL MOTION. Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than 10 days after the entry of the judgment.

(e) DENYING THE MOTION FOR JUDGMENT AS A MATTER OF LAW; REVERSAL ON APPEAL. If the court

denies the motion for judgment as a matter of law, the prevailing party may, as appellee, assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.

STATEMENT

This appeal concerns the extent to which Rule 50 may be used to abrogate a party's constitutional right to a jury trial. Specifically, may a judge use Rule 50 to enter judgment contrary to a verdict based on a lack of evidence to support a modified version of the question the jury was charged with answering?

This case required a jury to determine whether parties to a General Release intended to release Petitioner Patrick J. Sikorski ("Sikorski") from a claim asserted by Respondent Okemo Mountain, Inc. ("Okemo") alleging Mr. Sikorski was liable to Okemo both as an agent and "individually." Specifically, the jury was asked to answer this question:

> Considering all the facts and circumstances surrounding its execution, do you find that the February 23, 1995 General Release[1] was intended to release the fraudulent inducement claim by Okemo against Mr. Sikorski?

Pet. App. 52a.[2] Unanimously, the jury answered "yes" to this question.

Okemo moved for judgment under Rule 50 claiming there was insufficient evidence to support the verdict on this question. The district court granted Okemo's Rule 50 motion for judgment (Pet. App. 20a), and the court of appeals affirmed (Pet. App. 40a). However, both courts

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[1] A copy of the General Release is included in the Petition Appendix at Pet. App. 49a.

[2] A copy of the Verdict is included in the Petition Appendix at Pet. App. 52a.

evaluated a different question than the one presented to the jury for determination. As the court of appeals stated:

> The claims on which the district court granted Okemo's Rule 50(b) motions were each premised upon *the jury's finding* that the release in fact covered the fraudulent inducement claim *against Sikorski individually*. Because we agree with the district court that the evidence fails as a matter of law to support *this* interpretation of the release, we affirm the district court's decision to grant these motions.

Pet. App. 44a (emphasis added). *See also* the district court's decision at Pet. App. 25a-29a.

The jury made no such finding, nor was it asked to make such a finding.

Entering judgment under Rule 50 based on a lack of evidence to support a question never put to the jury deprived Mr. Sikorski, and would deprive any litigant, of his constitutional rights to a jury trial and to procedural and substantive due process of law on both the issue that *was* tried and the issue that *was not* tried, but on which judgment entered. The reviewing court's usurpation of the jury verdict based on an evaluation of the sufficiency of evidence supporting a question never put to the jury violates every concept of due process and fairness and impugns the integrity of our judiciary.

This case originated in 1992 when Mr. Sikorski was sued in diversity in the District of Vermont by Okemo. Okemo alleged that in his simultaneous, dual legal capacity as an individual and as an agent of his principal and co-defendant, the United States Sporting Clay's Association ("USSCA"), Mr. Sikorski had defrauded Okemo by

misrepresenting his ability to promote and organize a sporting event.

Three weeks before trial of the fraudulent inducement claim, Okemo settled with USCCA and executed a General Release. Pet. App. 49a. In material part, the instrument purported to release "officers, agents, [and] employees [of USSCA] ... of and from all, and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money,..., controversies, agreements, promises, ..., damages, judgments,..., claims and demands whatsoever." *Okemo Mountain, Inc. v. United States Sporting Clay's Ass'n.*, 376 F.3d 102, 104 (2d Cir. 2004) and Pet. App. 3a (quoting the General Release Pet. App. 49a).

A copy of the release "was not furnished to the district court after settlement, nor was it furnished to Sikorski . . . ." *Okemo, 376 F.3d at 104.* Sikorski represented himself at a bench trial and the district court found that Sikorski, acting individually, was liable and entered judgment against him in 1995 on Okemo's claim of fraudulent inducement (the "1995 Judgment").

Eight years passed. Having failed to collect the 1995 Judgment, in 2003 Okemo petitioned the district court to renew the 1995 Judgment for another eight years. At that time, Sikorski first uncovered the release and moved for summary judgment claiming he was covered by the release. Okemo cross moved claiming he was not covered by the release. The district court entered summary judgment in favor of Okemo holding that the terms of the release were not ambiguous and did not release Sikorski from the 1995 Judgment. Sikorski appealed to the Court of Appeals for the Second Circuit (the "2004 Appeal").

In the 2004 Appeal, all three members of the panel agreed that the summary judgment in Okemo's favor was

in error. A two judge majority reversed the district court ruling that the release was ambiguous as a matter of law and remanded stating: "a trial is necessary to consider 'what was within the contemplation of the parties when the release was executed, which in turn is to be resolved in the light of the surrounding facts and circumstances under which the parties acted.'" *Okemo*, 376 F.3d at 104-105 (quoting *Economou v. Economou*, 399 A.2d 496, 500 (Vt. 1979)) and Pet. App. 5a.

In his dissenting opinion, now Chief Judge Jacobs argued that the release unambiguously released Mr. Sikorski from the claims asserted by Okemo's fraudulent inducement claim and stated he would have entered judgment for Sikorski as a matter of law. *Okemo Mountain, Inc.*, 376 F.3d at 106-112 and Pet. App. 7a. Judge Jacobs argued that "the release here is wholly unambiguous as to any person who was in the enumerated category of USSCA agent as to any claim by Okemo arising out of the failed clay-shooting tournament." *Id.* at 109 and Pet. App. 15a. As he pointed out,

> lawyers for parties in litigation should be able to rely upon a general release to avoid embroilment in litigation on matters arising from the underlying transactions. Unless a release categorically releases all persons classifiable as releasees (in whatever capacity) as to the underlying controversies, the buyer of the release has purchased little of value.

Id. at 110 and Pet. App. 15a. With these opinions in mind, the litigants and the district court took up the case again.

At the trial on remand, during the charge conference, the parties and the district court engaged in extensive debate about precisely how to phrase the release question

to the jury in light of the appeal court's decision. The debate covered twenty-four pages of transcript and, by Sikorski's count, over fourteen different iterations of the question were propounded, discussed and refined. The specific question to be propounded to the jury on the jury verdict form and the associated jury instructions that the jury would use to answer that question were important to the litigants and the district court. Getting the jury question right was critical because, as the court of appeals acknowledged, nearly every other issue to be decided by the jury was "premised upon the jury's finding that the release in fact covered the fraudulent inducement claim . . . ." [3] *Okemo Mountain, Inc. v. Sikorski*, 303 Fed App'x 938, 940 (2d Cir. Dec. 19, 2008) and Pet. App. at 44a.

Not once during that entire debate, or the trial for that matter, did the district court, Okemo or Sikorski propose framing the question to the jury in the form later evaluated by the district court and the 2008 Appeal panel under Rule 50; that is, whether the release in fact covered the fraudulent inducement claim against Sikorski *individually*.

In the end, it was Okemo's counsel who proposed the language used by the district court on the jury verdict form and on which the district court instructed the jury. It was *that* question which the jury decided. Pet. App. at 52a.

When presenting the question proposed by Okemo to the jury, the district court provided no legal instruction to the jury on the meaning of "individual liability" or what would be required as a matter of law for them to find that the release "covered Okemo's fraudulent inducement claim against Sikorski individually." Mr. Sikorski did not request

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[3] The 2008 Appeal panel also tacked the following words on the end of this quote, "against Sikorski individually." *Okemo*, 303 Fed App'x at 940 and Pet. App. 44a. The jury made no such finding.

any such instruction or object to the lack of any such instruction because determining whether there was a specific intent to release him from "individual liability" was not the issue the parties or the district court asked the jury to decide.

At the close of Sikorski's evidence, Okemo moved for judgment as a matter of law claiming Sikorski failed to present sufficient evidence on the release issue. At that time, neither Okemo nor the district court articulated any need for or lack of proof of a release from "individual liability." Accordingly, while Sikorski objected to Okemo's Rule 50 motion, he made no effort to present any additional evidence to prove the release covered him "individually." Instead, he relied on the evidence he had already presented. Okemo's Rule 50 motion was denied.

Later, at the close of all the evidence, Okemo renewed its Rule 50 motion. Again, neither Okemo argued nor the district court articulated any failure on Sikorski's part to prove any intent on the part of the releasors to release him in his specific capacity as an "individual." Accordingly, while Sikorski objected to the Rule 50 motion, he made no effort to submit any additional evidence directed to that issue. It was not the question that Okemo proposed or the question the court said it would put to the jury. Again, Okemo's Rule 50 motion was denied.

The parties then delivered closing arguments. However, because it was not the issue that the jury was to be charged with answering, Sikorski did not attempt to persuade the jury that the releasors had any specific intent to release him "individually."

The district court then instructed the jury on the law. The court provided no instruction to the jury on what would be required to prove the releasors intended to release Mr. Sikorski "individually" nor was there any instruction

on what it might mean to be "individually liable" or to act in an "individual capacity" as compared to an "agency capacity." There was no legal instruction on any distinction between "agency" and "individual" liability.[4] And, Mr. Sikorski did not request any such instruction or object to the lack of such instruction because the question to be posed to the jury on the jury verdict form did not require the jury to make such legal distinctions from the facts.

After deliberation, the jury rendered its verdict answering the question that was presented to it, and unanimously finding that the release was intended to release Sikorski from Okemo's fraudulent inducement claim prior to the 1995 trial and resulting judgment. Pet. App. 52a.

After the verdict was returned, Okemo renewed its Rule 50 motion for judgment as a matter of law. Thirty-two weeks later, the district court *changed* the question that it had presented to the jury, measured the evidence presented at trial against the *altered* question, weighed the strength of evidence and assessed the credibility of witnesses against the *modified* question and then entered judgment as a matter of law in favor of Okemo on the *revised* issue and other derivative jury findings. Pet. App. 20a. The end result was a mirror image of the district court's original view of the facts in favor of Okemo two years earlier on summary judgment "concluding that Okemo's intent had been to release agents acting within the scope of agency, but not Sikorski, who also acted individually." Pet. App. 22a. However, that was the precise conclusion on which the district court had been reversed on appeal in 2004. Cross-appeals followed.

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[4] There was limited instruction on the difference between "personal" and "agency" liability.

On appeal, the Second Circuit followed the district court's lead and it issued a Summary Order on December 19, 2008 concluding that the "release did not cover the fraudulent inducement action brought against Sikorski *in his individual capacity*." *Okemo*, 303 Fed. App'x at 940 and Pet. App. 43a and 44a. Nothing in the appeal court's order even acknowledges the actual question presented to and decided by the jury.

Mr. Sikorski's petition for panel and *en banc* rehearing was denied on March 17, 2009. Pet. App. 47a.

REASONS FOR GRANTING THE PETITION

Soon after Rule 50 was adopted in 1938, there was concern that it might be misused by judges who favored an outcome in their cases that was contrary to a jury's verdict and, thus, deprive litigants of their constitutional right to a jury trial. *See generally*, 9B Charles Allen Wright & Arthur R. Miller Federal Practice and Procedure § 2522 (3d ed. 2008). This Court quickly reassured the public that Rule 50(b) "has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact — a jury being the constitutional tribunal provided for trying facts in courts of law." *Berry v. United States*, 312 U.S. 450, 453 (1941).

When the Rule was amended in 1991, similar concerns were raised and the Rules Advisory Committee responded by saying that

> 'action taken under the rule * * * is not an intrusion on any responsibility for factual determinations conferred on the jury by the Seventh Amendment or any other provision of federal law,' and stresse[d] that the revision 'aims to facilitate the exercise by the court of its responsibility to assure the

> fidelity of its judgment to the controlling law, a responsibility imposed by the Due Process Clause of the Fifth Amendment.'

9B Charles Allen Wright & Arthur R. Miller Federal Practice and Procedure § 2521 n.18 (3d ed. 2008) (quoting Advisory Committee Note to the 1991 amendments). Nevertheless, and despite these longstanding admonitions, that is precisely what occurred here.

No evaluation or determination has *ever* been made by *any* reviewing judge below that there was insufficient evidence to support the question on which the jury rendered its verdict. Instead, a determination has been made that there was insufficient evidence to support a verdict on a modified version of that question. By failing to evaluate the evidence supporting the question actually considered by the jury, the judges below deprived Mr. Sikorski of his constitutional right to a jury trial and due process of law.

To preserve constitutional rights and the public's trust in our judiciary, this Court should establish a bright line rule prohibiting any court reviewing a jury verdict for sufficiency of evidence under Rule 50 from amending, modifying, altering or in any other way changing the question presented for determination by the jury.

I. *A Bright Line Rule Is Required*

Both reviewing courts below were to perform a *de novo* review of the sufficiency of the evidence to support the jury's verdict. However, while the text of Rule 50 appears to require that the question to be considered on review should be the same question decided by the jury, here both reviewing courts apparently felt comfortable modifying the jury question when performing their reviews. Such modification should not be permitted. This Petition should

be granted so that this Court can establish a bright line rule clarifying that any such modification, however slight, is prohibited. A bright line rule will preserve constitutional due process and jury trial rights and the integrity of our courts.

This Court recently had occasion to revisit Rule 50 and the procedural safeguards that allow a court to ensure that the evidence at trial is sufficient to sustain a verdict while preserving a litigant's right to a jury trial. *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006). *Unitherm* clarified a bright line procedural rule establishing exactly what litigants must do to preserve the right to appeal Rule 50 decisions. *Unitherm*, 546 U.S. at 402-407. This case calls for a similar clarification of Rule 50 that rejects any approach that provokes hair-splitting arguments concerning whether, under Rule 50, a particular judge did or did not review the same question presented to a jury. A reviewing judge should have no discretion to modify, alter or in any other way change the question the jury decided. Any Rule 50 review of the sufficiency of evidence to support any jury verdict should be directed to the precise question the jury was charged with answering. Permitting any leeway to make such modifications would too far intrude upon the safeguards needed to protect a party's right to a jury trial from the improper application of Rule 50 and would create multiple opportunities for such intrusion.

Anything but a bright line rule that allows any exercise of discretion by the reviewing court to modify the jury question during a Rule 50 evaluation leads to a scenario in which a jury might be charged with answering question A, but the court's Rule 50 analysis may involve looking at questions B,C or D or any other question along the continuum of possibilities. For example, a Rule 50 analysis may be performed (1) at the conclusion of the plaintiff's evidence, (2) at the conclusion of all the evidence,

(3) within 10 days of judgment after a verdict is rendered and (4) upon appeal. If judges were permitted to make even the slightest modification to the jury question when performing such reviews, it would be possible to end up with five different iterations of the question by the time the case were decided on appeal. In that case, by what measure or standard would any modification of the jury issue be permitted? How would a reviewing court know how far it can or may go in changing the question? Would it be proper for an appellate court to review the question analyzed by the district court, the jury or its own unique formulation? How would any judge determine whether a change is minor or major or evaluate how any change might have impacted the jury trial itself?

A system without a bright line rule would be perverse and inefficient for, if the jury question were subject to change as each reviewing court saw fit, the utility of the due process protections of Rule 50 as a check on improper jury verdicts would evaporate. Rule 50 reviews must be focused on the precise issue the jury faced with absolutely no discretion on the court's part to modify the question.

Such a bright line rule would not, of course, eliminate the already existing safeguards necessary to ensure that the proper question was presented to the jury in first instance. The purpose of Rule 50 is to challenge the sufficiency of the evidence, rather than the correctness of questions of law; questions of law may be raised on appeal with or without a prior Rule 50 motion. *Ruyle v. Continental Oil Co.*, 44 F.3d 837, 841 (10th Cir. 1994), *certiorari den.*, 516 U.S. 906. At any number of times during the trial, and especially after the delivery of jury instructions, the litigants have the right and the duty to advocate for any necessary modification of the jury issues. And, on appeal, if rights below were properly preserved, the propriety of the question presented to the jury may be

challenged. Those rights, however, should not be confused with the rights, procedures and analysis of Rule 50 reviews because Rule 50 does not ask *whether* the proper question was put to jury, but only whether the evidence at trial supported jury's verdict on the question that *was* put to the jury. An adoption of any other rule would hinder the just and efficient operation of the federal courts by degrading the consistent and predictable application of the rules of procedure.

Finally, if a case proceeds to a *de novo* Rule 50 review by a court of appeals, and the court of appeals issues a decision that modifies the jury question in any way, the losing party effectively has no where to turn for appellate review. Certainly, the courts of appeal are understandably loath to hear re-argument of already decided cases and, it should not be this Court's function to evaluate on an ongoing basis whether appellate courts have gone too far in changing the questions presented to juries when conducting their Rule 50 analyses. As occurred in this case, in its *de novo* review, the appellate panel's decision reported that it considered a modified question, leaving Mr. Sikorski with the rather daunting task (after a failed request for rehearing) of persuading this Court hear to this appeal. This is unsatisfactory. If a bright line rule were in place, appellate (and district) courts would be constrained to toe that line when performing their reviews under Rule 50. In this case, the appellate court would have been required to take a much more critical – albeit *de novo* – review of the district court's Rule 50 analysis, and could not have adopted the district court's modification of the jury question as its own.

II. *For The Issue Raised By This Petition, If the Questions Are Different, It Should Make No Difference Which Question Was "Better" or "Correct"*

When considering Mr. Sikorski's request for a bright line rule, this Court may ask whether the question posed by the reviewing courts below was a "better question" than the question presented to the jury.

If the Rule 50 question is different than the jury question, whether one is "better" or "correct" by any measure, should make no difference to this Court's evaluation of the constitutional question presented by this Petition. The issue before this Court does not concern, and we do not ask this Court to decide, whether the question presented to the jury in this case was the "right" one.[5] Rather, the question before this Court in this Petition is narrowly directed to the much more important conflict that may arise in all jury cases between the power of the judiciary to correct a clearly erroneous jury verdict while simultaneously preserving the litigants' right to a jury trial. Thus, this Petition presupposes that the jury question in this case was properly phrased for this case and only asks whether a reviewing court may vacate the jury's work under Rule 50 through a post-verdict analysis of evidence measured against a different jury question. Any other supposition would be false, for the question that was asked of the jury was the question that was asked of the jury. Nothing can change that.

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[5] Certainly, Sikorski was satisfied with the question actually presented to the jury and Okemo, having suggested the question, is in no position to complain. No party has ever challenged the propriety of the question presented to the jury.

Moreover, the "correctness" of the question presented to the jury in this case is not something this Court needs to address because: (1) the trial court was the proper entity to make that determination on the day the jury was charged, in light of the changed posture of the case[6] long after receiving the case back from the Court of Appeals on remand; (2) the "correctness" of the question was stipulated to, indeed the question was framed, by Okemo and then accepted by the district court with full knowledge of the posture of the case at that time; and (3) Okemo never challenged the jury question at issue, thus waiving any claim now that it was not the "correct" question.

Accordingly, this Petition presumes that the question put to the jury was the correct question and asks this Court only whether as a matter of law, the reviewing court must confine its evaluation of the sufficiency of the evidence to the precise question that was presented to the jury in order to preserve a litigant's constitutional right to a jury trial? Plainly, the answer must be yes. Failure to do so would deprive any litigant of the rights and benefits of a jury trial in several important ways.

A post-verdict Rule 50 evaluation of a different question than that presented to the jury:

1. Deprives the litigants of the timely opportunity to advocate for and, then, object to jury instructions or a verdict form that address the new question;

2. Deprives the litigants of the opportunity at trial to present evidence and closing argument to the jury to support the new issue;

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[6] After the 2004 Appeal, Mr. Sikorski asserted a number of affirmative claims and defenses against Okemo that changed the posture of the case. Pet. App. 23a.

3. Deprives the litigants of the opportunity at trial to object to the introduction of evidence directed to an issue that they will be unaware of until after the trial concludes;

4. Deprives the litigants of the opportunity to advocate or object to the need for additional legal instructions to the jury that may be raised by questions submitted to the court from the jury room during deliberations;

5. Deprives the litigants of the timely opportunity to make and/or respond to post-verdict motions for judgment pursuant to Rule 50 on the *new* issue created by the court long after the jury has been dismissed.

In short, changing the jury question after the trial is over and the jury has gone home is tantamount to a "bait and switch" in the commercial world. It wholly deprives all litigants in a case of their constitutional right to a jury trial on the questions that *were* tried and the attendant and necessary due process of law. It blinds litigants during trial, leaving them to guess at what issues they should be addressing and preserving during trial and to wonder what they may confront post-verdict. It deprives the jury of its role and function. Changing, modifying or altering the question after the fact should not be permitted in any jury trial. If a Rule 50 analysis is to be performed, it must be performed on the specific and precise question that was presented to the jury.

In this particular case, because the revised question evaluated by the judges was materially different than that presented to and decided by the jury, most of the "horribles" listed above actually came directly to bear on Mr. Sikorski. They are not theoretical.

First, the trial judge's post-verdict repeated qualification of the jury question by inserting the term "in his individual capacity" into the question, deprived Mr. Sikorski of the right and opportunity to present and/or object to evidence during trial that would have clarified his position concerning that term and its potential applicability to the dispute. If he had known the precise post-verdict issue that would be evaluated for sufficiency of evidence, Mr. Sikorski could very well have presented additional evidence at trial to show that the parties to the release specifically intended to release him "individually."

Second, as the Court of Appeals made clear in the 2004 Appeal, the trial was to be about the intended meaning of the release which was, in turn, to be determined by the evidence of the parties' actions and statements at the time of its execution. Yet, the term "individually" does not even appear in the text of the General Release itself. If the trial court had advised Mr. Sikorski that the jury would be charged with deciding whether the releasors had a specific intent to release him "individually," he could have objected to this burden and might have prevailed. He certainly would have had an opportunity to ask for instructions of law that would have informed the jury exactly what is required as a matter of law to prove such specific intent. If he did not prevail on his request for such instructions, he would have been able to object and, thus, preserve his objection for appeal. As it turned out, however, he was deprived of all those rights and opportunities because the question was changed and the change was only announced in the trial court's Rule 50 decision thirty-two weeks after the verdict came down, long after the point when knowing of the change might have made a difference.

Third, the purpose of a Rule 50 motion is "to alert the opposing party to the movant's claim of insufficiency" of the evidence "before the case goes to the jury, so that [the] opponent possibly may cure any deficiency in his case

should the motion have any merit." *Martinez Moll v. Levitt & Sons of Puerto Rico, Inc.*, 583 F.2d 565, 569 (1st Cir. 1978). Mr. Sikorski was deprived of his right to supplement his evidence after Okemo moved for judgment as a matter of law, but before the jury retired, in order to meet the question that was never presented to the jury.

Fourth, when the jury came back with questions for the judge during their deliberations, Mr. Sikorski was deprived of the opportunity to object to or advocate for a response that would take into account the revised jury issue not then before the jury. In this case, the jury did come back with a question only thirty minutes after beginning their deliberations asking: "Are we considering the intent of the releases [sic] executors or the release itself?" Clearly, the jury was concerned about how to approach the principal issue in the case. If the jury had been faced with the verdict form question as subsequently modified by the Rule 50 reviewing judges, the question or questions they asked may have been very different. We will never know.

Finally, in this case, the trial court gave no legal instruction as to how a juror should interpret the term "individual liability" or distinguish between so-called "agency liability" and "individual liability" or "individual capacity" arising from precisely the same actions taken by Mr. Sikorski. *See E.R. Squibb & Sons, Inc. v. Lloyd's & Companies*, 241 F.3d 154, 167 (2d Cir. 2001) ("The instructions for a verdict form are reviewed de novo; we find an instruction erroneous if it misleads the jury as to the correct legal standard or *does not adequately inform the jury on the law.*") (emphasis added) (internal quotations omitted). Under the *E.R. Squibb* standard, the verdict question as ultimately phrased by the reviewing judges would have been erroneous because, at a minimum, it did not adequately inform the jury on the legal meaning of the terms.

Without instruction, how many lawyers, much less jurors, could cogently explain or understand any distinction between so-called simultaneous "agency" and "individual" liability for the *same* individual based on the *same* acts and seeking precisely the *same* damages–to the penny? While it may very well be that there is no such distinction, as Chief Judge Jacobs pointed out in his dissent in the 2004 appeal, *Okemo Mountain*, 376 F.3d at 110-112 and Pet. App. at 16a-19a, the Rule 50 reviewing judges obviously saw a material distinction. Not only does the disparity in views reflected in Judge Jacobs' dissent illustrate the substantial and material difference between the verdict question the jury confronted and the question addressed by the Rule 50 reviewing judges, but it shows that legal instruction about those differences would have been critical to obtaining a just result in the case had the jury question been phrased as the reviewing judges wished. The legal meaning of words like "individual capacity," "individual claims," and "individual liability" are not clear or intuitive. If the jury had been presented with the revised question, it would have been clear error to not instruct them accordingly.

Perhaps more important than the loss of procedural safeguards and predictability in process for the litigants, is that changing the jury question after the fact damages the integrity of and the public's faith in our jury trial system and our judiciary because, even if results are well intended by the court, changing the question after the fact with a resulting outcome that reverses a jury's verdict suggests impropriety in violation of the Code of Conduct for United States Judges. Code of Conduct for United States Judges Canons 1 and 2. If jurors learn that their hard work was superseded by a judge who decided a case based on an issue they never were asked to consider, their dismay with the entire process is predictable. Regardless of the good intentions of the court to achieve a just outcome, anyone

involved in or knowledgeable about such a case may believe the "fix was in" for the prevailing party.

Mr. Sikorski does not suggest any impropriety here by any judge involved in this case, but only raises this point to focus this Court's attention on the potentially irreparable damage to our justice system that this case and others like it can present. Certainly, having won a hard fought trial with a unanimous jury verdict, Mr. Sikorski's faith in our system was shattered when the reviewing judges overturned that verdict based on an issue he never had a chance to try. It may be that others, including opposing counsel, their clients, their insurers, the press, members of the local bar, the court's staff and members of the community who are aware of this case and its outcome have a similar, but unexpressed, view. Here, the judges below so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. U.S. Supreme Court Rule 10(a).

III. *The Two Questions Are Materially Different From Each Other*

Not only does Judge Jacob's dissent establish the significant difference in meaning that the inclusion of the phrase "individual liability" would have made in the jury question, but it is evident from their rulings that the inclusion of that phrase was material to the reviewing judges' analyses. Evaluating the Rule 50 motion *de novo*, both the Court of Appeals and the district court qualified their Rule 50 decision with the term "individual capacity."[7] A plain reading of their decisions shows that to defeat

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[7] During oral argument in the 2008 Appeal, Judge Livingston pointedly asked Mr. Sikorski's counsel to identify the evidence that demonstrated the releasor's intent to release Mr. Sikorski "individually." Counsel responded by pointing out that that was not the question the jury was charged with answering.

Okemo's Rule 50 motion, both the district court and the Court of Appeals demanded that Mr. Sikorski identify evidence presented at trial that established a specific intent of the parties to the General Release to release Mr. Sikorski in his "individual capacity."[8]

The difference between the question the jury was asked to decide and the question the district and appeals courts analyzed was squarely presented by the district court itself.

> [T]he jury found the 1995 release was intended to release Sikorski from Okemo's fraudulent inducement claim. . . . Therefore, to grant Okemo's motion on this issue, the Court must determine whether . . . the only conclusion the jury could have reached is that Okemo and USSCA did not intend to release Sikorski from the fraudulent inducement claim against him *in his individual capacity*.

Okemo Mountain, Inc. v. Sikorski, 2006 WL 333100 (D.Vt. Nov. 16, 2006) and Pet. App. 25a (original footnotes and emphasis omitted, emphasis added).

The jury question propounded by Okemo, adopted by the district court, and actually answered by the jury broadly asked only whether the General Release was

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[8] The district court and the 2008 Court of Appeals panel appear to have gone further than allowed by Rule 50 and, in contravention of the 2004 Appeal decision that the release is ambiguous as a matter of law, *interpreted* the release to "not cover the fraudulent inducement claim against Sikorski in his individual capacity." Pet. App. 43a. Rule 50, however, only permits the reviewing court to reject a verdict for lack of evidence. It does not permit the reviewing court to go further and, from the evidence, make affirmative findings of fact on issues such as intent. Changing the jury question opens the door to such improprieties.

intended to release Mr. Sikorski from Okemo's fraudulent inducement claim, leaving it up to the jury to decide what the claim consisted of and whether the release covered it. While Okemo's complaint alleged a mixed claim of agency and so called "individual" liability, the question posed to the jury did not distinguish between these terms or require any determination of any specific separate intent of the releasors to release Mr. Sikorski either "individually" or in his capacity as an "agent." Instead, the question posed to the jury fully permitted them to conclude that the releasor's intended to release Mr. Sikorski from Okemo's mixed fraudulent inducement claim in any and all capacities simply because (a) the release was a general release, (b) Mr. Sikorski fell within the class of USSCA agents covered by the release and (c) the fraudulent inducement claim was a cause of action "related" to Sikorski's agency actions. In 2004, the court of appeals suggested this very conclusion might be appropriate and valid.

> [W]e conclude that reasonable people could differ about the effect of the release upon Sikorski in his individual capacity for causes of action arising from the failed USSCA event for the following reasons: (1) Most importantly, the release could not have been more broadly drawn, but was silent about whether the instrument more specifically sought to release the class of agents from all related causes of action (even in their individual capacities) or whether the release sought to release agents only in their agency capacities[.]

Okemo, 376 F.3d at 105 and Pet. App. 5a.[9]

Finally, and perhaps the best measure of the important distinction between the two questions is the fact that both the district court and the Court of Appeals found it necessary to qualify the question actually presented to the jury with the term "individually" in every single instance they referred to it in their analyses. Thus, the opinions themselves demonstrate that the inserted qualification was material to the courts' analyses, otherwise there would have been no point in making it.

CONCLUSION

This case should be reversed and remanded to the court of appeals with direction to properly apply Rule 50 by measuring the sufficiency of the evidence at trial against the specific and particular question actually decided by the jury. That task has never been performed by any judge. If Okemo's Rule 50 motion is then denied, the court of appeals should reconsider all of its other rulings which depended upon its erroneous evaluation of the release issue.

For the above and foregoing reasons, Petitioner respectfully requests the issuance of a writ of certiorari to the United States Court of Appeals for the Second Circuit.

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[9] Indeed, while not material to the issue before this Court on this Petition, this approach, approved by the Court of Appeals, is the one largely pursued by Mr. Sikorski in his presentation at trial – and the theory which may have won over the jury. Under that theory, no specific intent to release Mr. Sikorski "individually" was required, just proof of a broad intent to release, agency and "related causes of action." There was ample evidence of all of these factors.

Respectfully submitted,

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APPENDIX

United States Court of Appeals,
Second Circuit.
OKEMO MOUNTAIN, INC., Plaintiff-Counter-Defendant-Appellee,
v.
UNITED STATES SPORTING CLAYS ASSOCIATION, and Bob L. Davis, Defendants-Counter-Claimants,
Patrick J. Sikorski, Defendant-Counter-Claimant-Appellant,
Overseas Services, Inc. d/b/a Expeditions, Defendant-Counter-Claimant.
Docket No. 03-9247.

Argued June 10, 2004.
Decided July 16, 2004.

Before: WALKER, Chief Judge, JACOBS, Circuit Judge, and STANCEU, Judge. [FN*]

FN* The Honorable Timothy C. Stanceu, of the United States Court of International Trade, sitting by designation.

Judge JACOBS dissents in a separate opinion.

JOHN M. WALKER, JR., Chief Judge.

Defendant-counter-claimant-appellant Patrick Sikorski ("Sikorski") appeals the judgment of the United States District Court for the District of Vermont (J. Garvan Murtha, *District Judge*) granting summary judgment to plaintiff-counter-defendant-appellee Okemo Mountain, Inc. ("Okemo") on Okemo's motion to renew a judgment against Sikorski from 1995 and on Sikorski's motion pursuant to Federal Rule of Civil Procedure 60(b)(5) for relief from the judgment on the basis of newly-discovered terms of a

release instrument used to settle the underlying lawsuit against his co-defendant and principal, United States Sporting Clays Association ("USSCA").[1] It is stipulated that Vermont law applies to this dispute. Because Vermont law requires that ambiguous releases be interpreted by a fact-finder as a question of fact, and reasonable people could differ as to the scope of the release at issue in this case, summary judgment for Okemo as a matter of law was not appropriate. Accordingly, we VACATE and REMAND for further proceedings.

Okemo brought this action to renew a judgment that was entered against Sikorski in 1995. Okemo had originally sued, *inter alios*, Sikorski, USSCA, and USSCA's president, Bob Davis, for a series of tort and contract claims arising out of a failed clay shooting event. Sikorski was originally sued both in his representative capacity as an agent of USSCA and in his individual capacity. In the course of settling the lawsuit with USSCA, Okemo entered into release agreements with both Bob Davis and USSCA, who were represented by different lawyers; Sikorski represented himself in the underlying suit *pro se*. The instrument signed by Okemo and USSCA purported to release "officers, agents, [and] employees [of USSCA] ... of and from all, and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, ..., controversies, agreements, promises, ..., damages, judgments, ..., claims and demands whatsoever." After releasing USSCA and its agents, Okemo proceeded to trial against Sikorski on the claims against him in his individual capacity. A copy of the release issued to USSCA and its agents was not furnished to the district court after settlement, nor was it furnished to Sikorski until 2003,

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[1] Federal Rule of Civil Procedure 60(b)(5) enables a district court to relieve a party "from a final judgment, order, or proceeding for the following reason[ ]: ... the judgment has been satisfied, released, or discharged ..."

when Okemo sought to renew its judgment. Okemo concedes that the instrument released Sikorski in his capacity as an agent. At issue is whether, under Vermont law, the release can be construed to bar claims against Sikorski in his individual capacity, since the underlying judgment Okemo seeks to renew found Sikorski liable only in his individual capacity.[2]

The district court held that the instrument could not be construed as releasing Sikorski in his personal capacity, principally relying upon *Horizon Financial, F.A. v. Hansen*, 791 F.Supp. 1561 (N.D.Ga.1992). The district court found that Okemo's having abandoned the claims against Sikorski in his agency capacity after entering into the release was probative evidence that "strongly suggests" that the intention of the release was narrow; accordingly, the district court entered judgment for Okemo and renewed its 1995 judgment, notwithstanding the discovery of the release.

We review a district court's grant of summary judgment de novo, *Dallas Aerospace, Inc. v. CIS Air Corp.*, 352 F.3d 775, 780 (2d Cir.2003), and a district court's denial of a Rule 60(b) motion for an abuse of discretion, *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 162 F.3d 724, 729 (2d Cir.1998). In sum, we read Vermont law to command a different result from the one reached by the district court. Vermont law plainly requires that when "the scope of the release cannot be determined from the language alone," and the "language of the document is ambiguous and must be clarified by reference to external evidence, construction becomes a question of fact

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[2] "An appeal from the denial of a motion for relief from judgment [pursuant to Rule 60(b)] raises only the question of whether that motion was properly disposed; it is not a vehicle for examining the underlying judgment itself." *Cody, Inc. v. Town of Woodbury*, 179 F.3d 52, 56 (2d Cir.1999).

[and][t]herefore summary judgment on this issue [is] error." *Inv. Props., Inc. v. Lyttle,* 169 Vt. 487, 498, 739 A.2d 1222 (1999) (citing *Hous. Vt. v. Goldsmith & Morris,* 165 Vt. 428, 430, 685 A.2d 1086 (1996)). Accordingly, here, where the language of the release is exceptionally broad but might reasonably be construed more narrowly to release agents of the principal only in their representative capacities, a trial is necessary to consider "what was within the contemplation of the parties when the release was executed, which in turn is to be resolved in the light of the surrounding facts and circumstances under which the parties acted." *Economou v. Economou,* 136 Vt. 611, 619, 399 A.2d 496 (1979).

To be sure, the threshold matter of the existence of ambiguity in the release is itself a question of law. *See Isbrandtsen v. N. Branch Corp.,* 150 Vt. 575, 577, 556 A.2d 81 (1988). A provision is ambiguous to the extent that reasonable people could differ as to its interpretation. *Id.* And the surrounding facts in this case do not resolve the ambiguity as a matter of law in either direction. On the contrary, we conclude that reasonable people could differ about the effect of the release upon Sikorski in his individual capacity for causes of action arising from the failed USSCA event for the following reasons: (1) Most importantly, the release could not have been more broadly drawn, but was silent about whether the instrument more specifically sought to release the class of agents from all related causes of action (even in their individual capacities) or whether the release sought to release agents only in their agency capacities; (2) The release included Sikorski's name because his name was in the caption of the case, but failed to mention him specifically elsewhere in the instrument; (3) USSCA must have been negotiating to benefit its agents and employees, who were ultimately released by the instrument, but it is less clear whether USSCA wanted to buy peace from every aspect of the lawsuit beyond the potential of its own liability (including

the benefit of not having its employees testify at any trial); (4) Okemo did not disclose the terms of the release either to the original district court at the time it settled or to Sikorski until 2003, eight years after the release was signed and judgment was entered; and (5) Bob Davis's lawyer was not aware that Okemo proceeded to trial against Sikorski--he assumed Okemo settled with all parties through release instruments.[3] Accordingly, a trial is warranted to determine what was contemplated by the parties at the time the release was executed. *See* Economou, 136 Vt. at 619, 399 A.2d 496. As the Vermont Supreme Court wrote in a related context ordering a trial on the terms of a release, "it is important ... that the circumstances surrounding the execution of the release be fully explored before any decision is made about its legal effect as to ... nonsigning part[ies]." *Smith v. Gainer*, 153 Vt. 442, 450, 571 A.2d 70 (1990).

Finally, we note that the district court's reliance on *Horizon*, which held a general release not to extend to agents in their individual capacities, is misplaced. First, *Horizon* applied Pennsylvania law, which holds that releases are generally disfavored. *Horizon*, 791 F.Supp. at 1572. Second, Pennsylvania law, unlike Vermont law, holds that "the intent to release a nonparty must be stated with such particularity that it is beyond doubt.... Unequivocal language is required to release a non-signatory." *Id.* at 1570. Third, the release construed in *Horizon* was drawn more narrowly than the one before us; it expressly reserved other causes of action, so could more easily be viewed as narrow. *Id.* at 1569-70. Accordingly,

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[3] It is also worth noting that both parties in this litigation believe that the release instrument is textually unambiguous; yet each reads it as warranting summary judgment in its favor. When each side reasonably thinks a textual provision unambiguously favors its position, and those positions are diametrically opposed, we feel comfortable treating that disagreement as somewhat probative of ambiguity.

Horizon is inapposite to the question of Vermont law implicated in this case.

CONCLUSION

For the reasons set forth above, the judgment of the district court is hereby VACATED and REMANDED.

JACOBS, Circuit Judge, dissenting.

Back in 1993, Okemo filed suit in diversity "for a series of tort and contract claims arising out of a failed clay-shooting event" (to use the summary phrase used in the majority opinion), naming as defendants: United States Sporting Clays Association ("USSCA"); Bob L. Davis, who was president of USSCA; and Patrick J. Sikorski, who in the only claim now relevant was identified variously as an "agent" of USSCA, an "employee" of USSCA, and as a person acting in his own interest. In the course of litigation, USSCA paid an amount in settlement and Okemo executed a general release running in favor of USSCA as well as its agents, employees, attorneys, and so on as usual. The case went to trial against Sikorski *pro se*, and Okemo won a judgment that has gone uncollected (and was partially discharged in bankruptcy). In the current proceeding Okemo seeks to renew the judgment pursuant to Vt. Stat. Ann. 12 § 506, and Sikorski invokes the release (which he recently discovered).

The district court cited the Vermont rule that a release is construed to reflect the intent of the parties as ascertained from the surrounding circumstances, *Okemo Mountain, Inc. v. Sikorski*, No. 1:93-cv-22 1, 4 (D.Vt. Oct. 23, 2003) (citing Economu v. Economu, 136 Vt. 611, 619, 399 A.2d 496 (1979)), and ruled that the release was not intended to discharge Sikorski in his "individual" capacity, an intent supposedly evidenced by the surrounding circumstance that Okemo pursued the claim against

Sikorski to judgment post-release. Since it is undisputed that the terms of the release were unknown to Sikorski (or the court) and that USSCA did not know that Okemo continued to litigate against Sikorski, that ruling is untenable. The majority remands for further findings on the intent of the contracting parties to release Sikorski as an "individual," *i.e.*, other than as an agent, if (as the majority erroneously supposes) the underlying judgment is predicated on acts outside the scope of Sikorski's agency.

I respectfully dissent and would reverse because the remand draws USSCA and Davis back into litigation and thus disturbs the peace they bought eight years ago, and because the majority's approach subverts the force and effect of innumerable releases bought to settle disputes in Vermont--and perhaps elsewhere. In my view, a standard-form release of a defendant's agents and employees unambiguously releases any person who was an agent or employee of the settling defendant at least with respect to any claim arising out of the transactions and events at issue in the suit. This dissent undertakes to show: [1] that the standard-form general release at issue released agents, and that Sikorski was alleged to be USSCA's agent in the cause of action that gives rise to the judgment up for renewal; [2] that that must be enough to effect release because otherwise the standard form fails in its principal purpose of granting peace; and [3] that it is error to limit the scope of the release to agents who are selfless and unerring.

I

Vermont law requires that civil awards be enforced, renewed, or revived within eight years of the original judgment. Vt. Stat. Ann. 12 § 506. Having failed to collect on its judgment from 1995 through 2003, Okemo brought the underlying suit to renew pursuant to § 506. Virtually all of the 1995 judgment ($424,000) was awarded on Okemo's claim that Sikorski fraudulently induced the ski resort to enter a joint venture with USSCA concerning the

failed clay-shooting event. (The other claims litigated in 1995 are irrelevant to this appeal.[4] The complaint in the original suit, which was not amended, alleged *passim* that Sikorski acted in tandem with USSCA and Davis as their agent in connection with his successful inducement of Okemo to participate in the clay-shooting-tournament joint venture.[5]

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[4] Okemo went to trial against Sikorski on claims of fraudulent inducement, double billing, and breach of a noncompete agreement. The district court ruled for Sikorski on the double-billing claim and awarded Okemo $50,000 on the contract claim. At oral argument on appeal, Sikorski's counsel stated that the $50,000 judgment was discharged in a personal bankruptcy proceeding; Okemo did not dispute that assertion.

[5] Okemo's complaint alleged that "[o]n December 18, 1990 representatives of USSCA met with representatives of Okemo Mountain in Ludlow, Vermont." Compl. ¶ 9. Davis and Sikorski were present when "USSCA through its agents and employees made representations to Okemo that USSCA was a nationally recognized and highly respected organization with vast experience in the sponsorship, organization, and management of Sporting Clay tournaments and outdoor expositions." *Id.* ¶ 10. On or about January 17, 1991, "Okemo and ... Davis, President of USSCA signed a ... Memo of Understanding for the 1991 East Coast Game Fair and USSCA Open" which "would mark the beginning of an exclusive long term relationship between the USSCA and Okemo Mountain...." Id. ¶ 11. "The USSCA agreed to be responsible for the general management, marketing and organization of the Event." *Id.* On February 11, 1991, "Okemo formed a Joint Venture with USSCA" through an agreement that essentially formalized the memo of understanding. *Id.* ¶ 12. "USSCA took primary responsibility for setting the budget ... based on its representations that it had significant experience" with clay shooting tournaments. *Id.* ¶ 16. The joint venture agreement further provided that "USSCA shall be Event Manager of this Joint Venture and shall be responsible primarily for the organization of the Event, securing sponsorships, soliciting tournament participants, soliciting exhibitors, the marketing of the Event, and the general management of the Event including the layout and design of the tournament and exhibition" (emphasis omitted). *Id.* ¶ 21. "USSCA entered into a contractual relationship with ... Sikorski and retained him as its employee and/or agent to assist USSCA in carrying out the responsibilities of USSCA as Event Manager of the 1991 Game Fair." *Id.* ¶ 22.

The tournament was a fiasco and led to Okemo's tort and contract actions against USSCA, Davis, and Sikorski.

Shortly before trial Okemo settled with USSCA and Davis[6] and gave them releases drafted by Davis' lawyer, Stacy Chapman, by which

> [OKEMO] remised, released, and forever discharged, and by these presents does ... remise, release and forever discharge ... [USSCA] its officers, *agents, employees,* attorneys, successors and assigns, of and from *all, and all manner of action and actions,* cause and causes of action, *suits,* debts, dues, sums of money, accounts, reckoning, bonds, bills, specialties, covenants, contracts, *controversies,* agreements, promises, variances, trespasses, *damages,* judgments, extents, executions, *claims and demands whatsoever,* in law or in equity, which against the [USSCA], its officers, *agents, employees,* attorneys, successors and assigns, [Okemo] *ever had, now has or* which its officers, agents, employees, attorneys, successors and assigns *has or may have* for, upon or by reason of *any matter, cause or thing whatsoever* from the beginning of the world to the day of *the date of these presents.*

In words and substance, this is what is understood by lawyers and judges to be a standard-form release. As I

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[6] The amount of the consideration Okemo received for the release is not entirely clear from the record, but its sufficiency is uncontested.

read it, Okemo released Sikorski categorically--*i.e.*, because he was an agent, as Okemo affirmatively alleges -- from any "action" against him and any "controversy" in which he and Okemo were then embroiled. In so many words, Okemo released any "agent[ ]" of USSCA from any "suit[ ]" it "now has ... by reason of any[...]thing whatsoever."

The majority opinion recites that this instrument "purported to release" USSCA and its agents from the tort and contract claims in the 1995 litigation, but did not entitle Sikorski to summary judgment in the underlying renewal action "because the district court found that Okemo's having abandoned the claims against Sikorski *in his agency capacity* after entering into the release was probative evidence that 'strongly suggests' that the intention of the release was narrow" (emphasis added). Maj. Op. at 104. Thus the only circumstance relied upon to show the intent of the contracting parties was Okemo's unilateral conduct in the bench trial that commenced three weeks after the release was executed. But the question is whether Okemo could proceed to trial notwithstanding the release; and it begs the question to say that it could because it did. There is zero probative value to the subsequent trial itself as evidence of the contractual intent or understanding of USSCA, Davis, the court, or Sikorski: Mr. Chapman (the lawyer who procured the release) was unaware that Okemo went to trial against Sikorski; the judge and Sikorski were not told the terms of the release during the 1995 proceedings; and Sikorski, who was appearing *pro se*, cannot be expected to have intuited the likelihood that the settling defendants would have insulated their agents and employees as well. Sikorski first learned the terms of the release last year.

II

In Vermont (as elsewhere) a release is a contract. Economou, 136 Vt. at 619, 399 A.2d 496. Its scope "is determined by the intention of the parties as expressed in

the terms of the particular instrument considered in light of all the facts and circumstances"--that is, "by a consideration of what was within the contemplation of the parties when the release was executed ..." *Id.; see also* Leo v. Hillman, 164 Vt. 94, 104, 665 A.2d 572 (1995). An exculpatory agreement (such as a release) is "construed strictly against the parties relying on it," but if its language is clear, "the parties 'are bound by the common meaning of the words which they chose to express the content of their understanding.' " *Douglass v. Skiing Standards, Inc.*, 142 Vt. 634, 636, 459 A.2d 97 (1983) (quoting Duke v. Duke, 140 Vt. 543, 546, 442 A.2d 460 (1982)). If a release is ambiguous (as the majority opinion holds), then resolution of the ambiguity is a question of fact to be decided on evidence of the parties' intent. *Investment Props. Inc. v. Lyttle*, 169 Vt. 487, 498, 739 A.2d 1222 (1999).

The majority cites Vermont's application of these principles in *Smith v. Gainer*, 153 Vt. 442, 571 A.2d 70 (1990), in which a release of Smith by Gainer for damages arising out of an automobile accident was deemed ambiguous with respect to a subsequent action by Smith *against* Gainer for damages arising out of the same accident. Id. at 447-48, 571 A.2d 70. *Smith* did not address the scope of a release with respect to agents, employees, attorneys and other categories of persons discharged by a releasee; indeed, the key question on remand was whether the release granted in favor of Smith was negotiated by Gainer's insurer. Id. at 105-06, 571 A.2d 70.

A closer and more useful precedent is *Leo v. Hillman*, 164 Vt. 94, 665 A.2d 572 (1995). In 1979 one Malinosky killed his former girlfriend and fled into hiding. Id. at 96-97, 665 A.2d 572. While he was at large, his in-state legal counsel settled tort and other claims asserted by the victim's sister, who signed a release discharging the killer of civil liability. *Id.* After Malinosky was apprehended, the sister as administrator of the victim's estate, asserted tort

and survival claims against Dr. Donald Hillman, the psychologist who treated Malinosky prior to the murder. Id. at 97, 665 A.2d 572. The doctor's defense of release was rejected by the Vermont Supreme Court:

> There was nothing in the understanding between Malinosky's representative and [the sister] which indicated even the slightest consciousness of [the doctor's] interests.... The motivation for the release, presumably supported by adequate consideration, appears to have been strictly bilateral. There is nothing in the record to suggest that [the doctor] w[as] aware of the negotiations between Malinosky's representative and [the sister] or that they sought to protect [his] interests in connection with that settlement.

Id. at 104, 665 A.2d 572. Thus in *Hillman,* though the underlying loss was the same, there was no reason to think that the parties or their lawyers had in mind a category of releasees that included Dr. Hillman. By the same token, if the release had discharged "treating psychologists," I do not think it could have been deemed ambiguous as to Dr. Hillman, nor would a hearing have been required to ascertain whether he was acting outside the scope of professional norms, or whether he was acting as a (fee-collecting) "individual"--as no doubt he was.[7] Similarly, the release here is wholly unambiguous as to any person who was in the enumerated category of USSCA agent as to any claim by Okemo arising out of the failed clay-shooting tournament.

In considering the intention of the parties, it is critical to keep in mind that a general release is bought to

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[7] The terms of the release are not set out in the opinion.

secure peace as well as to settle pending or impending claims. Such peace is (at the least) freedom from the risk, trouble, and expense of litigation over the underlying events--as a defendant, indemnitor, witness, or in any other capacity. I know this because judges and lawyers know the customs and practices of the profession and need consult no expert to know the nature and intended effect of a standard form so common as a general release. *See generally* Marx & Co., Inc. v. Diner's Club, Inc., 550 F.2d 505, 512 (2d Cir.1977).

The majority nevertheless holds that Sikorski may still be on the hook because he was found liable "as an individual" in 1995, and that a hearing is required to ascertain whether USSCA's release discharged Sikorski for actions taken "beyond the scope" of his authority as USSCA's agent. Putting aside (until Section III) the deficiencies in Okemo's theory of agency, the finding that Sikorski defrauded Okemo as an "individual" has no bearing on the force and effect of the release. Indeed, a general release would lose an unpredictable part of its effect if "employees" were released only insofar as the wrongful conduct was within the authorized scope of the employment or if "agents" were released only insofar as the wrongful conduct was within the authorized scope of the agency. That is because litigation could continue against employees and agents who performed badly, whether by reason of incompetence, addiction, or other incapacity, or by negligence or failure of supervision, and because the post-release litigation of these issues of authority would tend to draw the principal releasee back into the controversy. There would be the risk of indemnity for judgments, or of attorneys' fees incurred by the employee or agent; the risk of third-party claims by them; the trouble of producing documents and witnesses; attorneys' fees in connection with all these things; the time of officers and employees distracted from business; continuing risk to reputation; and so on.

Moreover, a finding that Sikorski was pursuing individual interests would not tend to support an inference that he was no agent. Everyone in every role is an individual as well, with individual interests: thus a broker has an individual interest in his commission, and the lawyer in her fee. Even so, lawyers for parties in litigation should be able to rely upon a general release to avoid embroilment in litigation on matters arising from the underlying transactions. Unless a release categorically releases all persons classifiable as releasees (in whatever capacity) as to the underlying controversies, the buyer of the release has purchased little of value.

This litigation is an example near to hand. USSCA no doubt assumed eight years ago that it was released from controversies over the clay-shooting tournament. On remand, however, the district court will hold a hearing on the scope of the release. USSCA may be subpoenaed to furnish documents and witnesses. Davis and perhaps other current and former USSCA employees may be required to testify or submit affidavits--not only about the release itself, but about the facts and circumstances of Okemo's contract and tort claims and Sikorski's role in them. If USSCA and Davis retain counsel to arrange compliance, costs will be incurred. Mr. Chapman, counsel to Davis eight years ago, may be called to testify, and Mr. Chapman may look to someone to compensate him for his time.

Perhaps this expense, dislocation, and controversy could be justified if there were an open fact question; but there is none. The majority remands for fact-finding "to determine what was contemplated by the parties at the time the release was executed." Op. at 105. That sounds like a fact issue if one seeks to know whether particular parties intended at a point in time to release Sikorski from liability as an individual. But the factual development will inevitably follow another course altogether. Except insofar

as explicit reservations are added to a standard-form general release (here there were none), the critical boilerplate is not subject to close negotiation between counsel or the parties; it is the product of generations of lawyers using litigation-tested terms. For example, the form at issue here releases "extents"; not one lawyer in a thousand knows what the word means, yet no competent lawyer would agree to cross it out; and no lawyer should hesitate to claim its benefit as necessary if an adversary attempted a maneuver analogous to such a writ. The only necessary intent formed by a releasee who takes a standard-form release is to buy peace--that is, a suppression of controversy touching the releasee's interest that is as thorough and complete as is customary. In this case, that would entail the end of litigation concerning the underlying controversy against anyone connected to USSCA; but it would not require a specifically formed intention as to particular acts by Sikorski or any other individual within a class of releasees. Since all this is already known and appreciated by lawyers and judges, it seems to me error to elicit fact-finding on the subject.

III

Even if the district court were to find on remand that the parties to the release did not intend to discharge USSCA's agents from liability for actions taken outside the scope of their agency, Okemo would not be entitled to a renewed judgment. Okemo concedes that Sikorski is discharged from any liability for acts undertaken as an agent of USSCA; it rests its argument on the 1995 finding that Sikorski acted in an "individual" capacity when he induced Okemo to enter the joint venture with the Association in 1990- 91. In its brief and at oral argument, Okemo characterized that finding--noted twice in the district court's 1995 opinion--as establishing that, with respect to the claims on which he was found liable, Sikorski acted "beyond the scope of [his] agency relationship" with the USSCA.

But Okemo seeks renewal of a judgment on its claim that Sikorski fraudulently induced Okemo to enter a joint venture with USSCA. Among other things, that inducement consisted of a meeting held December 18, 1990 at which (Okemo alleged) Sikorski acted "in [his] representative capacity" *and* "individually." Compl. ¶ 119. According to the district court's 1995 opinion, this (and other evidence)

> convincingly demonstrated that Sikorski, acting individually, misrepresented his experience and capabilities in the management, promotion, budgeting and financial oversight of Game Fairs and similar outdoor events. In addition, Sikorski made a specific factual representation as to [a] sponsorship commitment of $50,000.

Okemo Mountain, Inc. v. Sikorski, No. 5: 93-CV-22 (D.Vt. May 10, 1995). But the fact that Sikorski made misrepresentations does not amount to a finding that he acted "beyond the scope of his agency." It is hornbook law that "[a] principal is subject to liability for loss caused to another by the other's reliance upon a tortious representation of a[n] ... agent, if the representation is: (a) authorized; (b) apparently authorized; or (c) within the power of the agent to make for the principal." Restatement (Second) of Agency § 257 (1958). "If the statement is one which, if true, the agent would be authorized or apparently authorized to make, the principal is subject to liability for it, although deceitfully made ..." Id. cmt. a. The rule is longstanding; it means that a misrepresentation, even if unauthorized, may nonetheless be "within the scope" of an agent's authority to act on behalf of his principal. *See, e.g.*, *Hydrolevel Corp. v. American Soc. of Mechanical Engineers, Inc.*, 635 F.2d 118, 125 (2d Cir.1980) (*citing Gleason v. Seaboard Air Line Co.*, 49 S.Ct. 161, 73 L.Ed. 415 (1929)).

Okemo did not contend in 1995 that Sikorski was without authority to act on behalf of USSCA in convincing the resort to participate in the joint venture or in carrying out the Association's duties as a party to it. Nor did the district court make findings in 1995 to that effect. Okemo now claims that after settling with Davis and USSCA in 1995, it went to trial against Sikorski only on the claims made against him for actions taken outside the scope of his agency. But the heart of Okemo's case (and the 1995 judgment) was fraudulent inducement, and all of the misrepresentations relevant to that claim are alleged to have been made by USSCA and by Davis and Sikorski as agents and employees of the Association. None of Okemo's allegations pertaining to fraudulent inducement assert that Sikorski was acting on his own; he acted (misrepresentations and all) to secure a location for a 1991 clay-shooting tournament and to produce the event--which is what USSCA sought to do and was alleged to have done. *See supra* n. 2; *see, e.g.,* *Town of Rutland v. City of Rutland,* 170 Vt. 87, 93-94, 743 A.2d 585 (1999) (rejecting defendant's claim that his lawyer, who sought and obtained approval for a public sewer, acted outside the scope of his authority).

A misrepresentation made by an agent may breach the agency agreement with an honest principal, but it does not evidence or bespeak conduct "outside the scope" of the agency. Indeed, principals remain liable for misrepresentations by agents which "if true, the agent would be authorized or apparently authorized to make." Restatement (Second) of Agency § 257 cmt. a; *see also* *Town of Rutland,* 170 Vt. at 93-94, 743 A.2d 585. This applies to Sikorski's misrepresentations about sponsorship prospects and his own experience in the tournament business: would it make any sense to characterize those representations as outside the scope of Sikorski's agency if they had been true?

In short, the district court did not find in 1995 that Sikorski acted "beyond the scope" of his agency, because (among other reasons) Okemo made no such claim in its complaint, Okemo raised no extra-agency theory of liability, and no such finding was germane to any issue presented to the district court.

* * * * * *

For the foregoing reasons, I respectfully dissent and would reverse the decision of the district court.

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

OKEMO MOUNTAIN, INC., Plaintiff and Counter-Defendant,	:	
v.	:	File No. 1:93-CV-22
PATRICK J. SIKORSKI, Defendant and Counter-Claimant.	:	

RULING ON POST-TRIAL MOTIONS
(Papers 251, 275, and 279)

I. Introduction

This case began as an action under 12 V.S.A. § 506 by plaintiff/counter-defendant Okemo Mountain, Inc. ("Okemo") to renew a judgment rendered in 1995 against defendant/counter-claimant Patrick J. Sikorski ("Sikorski"), but expanded when Sikorski filed various affirmative defenses and counterclaims. The most recent twist in this gordian litigation occurred at the conclusion of the April 2006 trial, when the jury found, among other things, that Sikorski should be awarded compensatory damages against Okemo in the amount of $650,000 based on findings of fraud, fraudulent concealment, fraudulent misrepresentation, abuse of process, and intentional infliction of emotional distress ("IIED"). A flurry of post-trial motions ensued, including motions filed by intervenors Richard Coutant and Salmon & Nostrand ("Intervenors"). Upon careful review of the filings and trial record, the Court rules as follows:

1. Okemo's motion for judgment as a matter of law is GRANTED as to the jury's findings concerning the release, fraud, estoppel, fraudulent concealment, fraudulent misrepresentation, and abuse of process, and DENIED as to the jury's finding of IIED;

2. Intervenors' motion for judgment as a matter of law is construed as a memorandum, thereby rendering the motion moot.

3. Okemo's and Intervenors' alternative motions for a new trial are GRANTED to the extent that a new trial is necessary to determine the appropriate amount of damages related to the IIED finding; and

4. As an alternative to a new trial, Sikorski shall have until December 15, 2006 to notify the Court whether he agrees to remit that portion of the jury award exceeding $250,000. Should Sikorski refuse to make such remittitur, this case shall be set for the January 2007 trial calendar to determine the appropriate amount of damages.

Further, it is hereby ORDERED that:

1. Sikorski's renewed motion for equitable relief from the 1995 judgment is GRANTED;

2. Okemo's request to renew the 1995 judgment is DENIED;

3. The 1995 judgment is VACATED in full; and

4. Okemo shall return any money collected thus far from Sikorski in partial fulfillment of the 1995 judgment.

II. Background[1]

In 2003, Okemo brought this action to renew a 1995 judgment for approximately $450,000 rendered against Sikorski.[2] Paper 104. In response, Sikorski sought to vacate the judgment under Fed. R. Civ. P. 60(b), arguing that a general release entered into by Okemo and the United States Sporting Clays Association ("USSCA") in 1995 - - the text of which was not known to Sikorski until May 2003 - - absolved him of all liability, or alternatively, that extraordinary circumstances warranted granting relief. Paper 110.

On October 23, 2003, this Court ruled in favor of Okemo on cross motions for summary judgment, concluding that Okemo's intent had been to release agents acting within the scope of agency, but not Sikorski, who also acted individually. Paper 121. The Second Circuit Court of

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[1] The following factual recitation sets forth those facts necessary to decide the pending matters. The interested reader is referred to the various opinions and rulings previously made during the course of this multi-chaptered dispute between Okemo and Sikorski. See, e.g., Okemo Mountain, Inc. v. U.S. Sporting Clays Ass'n, 376 F.3d 102 (2d Cir. 2004).

[2] Following a bench trial in 1995, Judge Billings found Sikorski, acting individually, had fraudulently induced Okemo to host a game fair by various misrepresentations, resulting in damages of $424,478.86; had unjustly enriched himself by double billing the amount of $50,388.35, an amount included in the $424,478.86; and had obtained $25,000 by intentionally violating a covenant not to compete. See Paper 96. Mr. Sikorski appealed, and the Second Circuit dismissed, subject to the right to reinstate following conclusion of bankruptcy proceedings; however, Sikorski did not timely reinstate his appeal. A Connecticut bankruptcy court ruled that the 1995 judgment was nondischargeable. See In re Sikorski, 239 B.R. 661 (Bankr. D. Conn. 1999).

Appeals subsequently vacated that ruling, explaining that the issue to be determined upon remand was: "whether, under Vermont law, the release can be construed to bar claims against Sikorski in his individual capacity, since the underlying judgment Okemo seeks to renew found Sikorski liable only in his individual capacity." See Okemo, 376 F.3d at 104. The Circuit further held that "a trial is warranted to determine what was contemplated by the parties at the time the release was executed"; specifically, whether the agreement released Sikorski in his agency capacity only or also in his individual capacity. Id. at 105.

Following remand, Sikorski filed an answer to Okemo's action to renew the judgment, asserting affirmative defenses of release, estoppel, and fraud. Sikorski also brought an independent action in equity pursuant to Rule 60(b) alleging fraud, and counterclaims for fraudulent misrepresentation, abuse of process, and IIED.[3] Paper 128. Sikorski's central assertion was that Okemo and Mueller "misrepresented material facts to Sikorski and to this Court by omitting any disclosure of the General Release and the consideration paid by the other defendants in that action that reduced damages, both prior to the trial and for more than eight years thereafter." Paper 128 ¶ 28.

During the week of April 3-7, 2006, the Court held a jury trial on all claims and reserved judgment on the equitable determination to renew the judgment. Before the

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[3] Sikorski additionally brought counterclaims for defamation, malicious prosecution, and negligence, and various claims against third-party-defendant Timothy T. Mueller ("Mueller"), president of Okemo. Paper 128. Prior to trial, the Court dismissed the defamation claim and granted summary judgment to Okemo and Mueller on the malicious prosecution claim. Paper 185. At the close of trial testimony, the Court dismissed all claims against Mueller and granted judgment to Okemo on the negligence claim. Docket Entries 253, 254.

case was submitted to the jury, Sikorski renewed his motion under Fed. R. Civ. P. 60(b) for equitable relief from the 1995 judgment. Paper 251. Also at that time, Okemo moved under Fed. R. Civ. P. 50(a) for judgment as a matter of law. The Court denied Okemo's motion. Docket Entry 253. Pursuant to the Court of Appeals' mandate in Okemo, the jury considered whether the 1995 release "was intended to release the fraudulent inducement claim by Okemo against Sikorski." Paper 257. The jury also considered whether Sikorski had proven that Okemo, through its attorney Richard Coutant ("Coutant"), had committed fraud upon the court; whether Okemo was estopped from executing or renewing the 1995 judgment; and whether Okemo was liable to Sikorski for fraudulent concealment, fraudulent misrepresentation, abuse of process, and intentional infliction of emotional distress. Paper 257. The jury answered all questions in the affirmative and awarded Sikorski $650,000 in compensatory damages for Okemo's wrongdoing, but no punitive damages. Paper 255.

Thereafter, the Court granted Coutant's and Salmon & Nostrand's application to intervene, Papers 264, 276, and the instant post-trial motions were filed.

III. Discussion

A. Okemo's and Intervenors' Motions for Judgment as a Matter of Law (Papers 275, 279)

A motion for judgment as a matter of law should be granted when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a)(1). In other words, the Court must determine whether, "viewed in the light most favorable to the nonmoving party, the evidence is such that, without weighing the credibility of witnesses or otherwise

considering the weight of evidence, there can be but one conclusion as to the verdict that reasonable [persons] could have reached." Indu Craft, Inc. v. Bank of Baroda, 47 F.3d 490, 494 (2d Cir. 1995) (internal quotation marks and citations omitted).

A party may file a post-trial motion for judgment as a matter of law only where, as in Okemo's case, it has first moved prior to submission of the case to the jury. Fed. R. Civ. P. 50(b); Docket Entry 253. Because Intervenors did not move for judgment as a matter of law under Rule 50(a) before the case was submitted to the jury (since they had not yet applied to intervene), the Court cannot construe their motion as one under Rule 50(b). The Court therefore construes their Rule 50(a) motion as a post-trial memorandum addressing their interests in the case at this time, as provided in the ruling on the application to intervene. See Paper 276.

1. Jury finding concerning the 1995 release

At the conclusion of the April trial that followed the Second Circuit's remand, the jury found the 1995 release was intended to release Sikorski from Okemo's fraudulent inducement claim.[4] Paper 255. Therefore, to grant Okemo's motion on this issue, the Court must determine whether, viewing the evidence in the light most favorable to Sikorski, the only conclusion the jury could have reached is that Okemo and USSCA did not intend to release Sikorski from the fraudulent inducement claim against him in his individual capacity.

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[4] The Court agreed to narrow the jury's inquiry to whether Okemo intended to release Sikorski from the fraudulent inducement claim. Trial Transcript ("TT") Day 4 at 265-67.

Having exhaustively reviewed the parties' filings and the trial transcript, the Court concludes that no reasonable jury could have decided that the release was intended to cover the fraudulent inducement claim against Sikorski as an individual. As a starting point, the consistent testimony of Stacy Chapman ("Chapman"), who was the attorney for USSCA president Bob Davis during the negotiation and execution of the release, and Coutant, who was the attorney for Okemo during the negotiation and execution of the release, confirmed that their intent was not to release Sikorski in his individual capacity on the fraudulent inducement claim; an intent supported by the surrounding circumstances:

- Chapman testified that shortly before the 1995 trial, he alone negotiated with Coutant for the settlement of all of Okemo's claims against Davis for $55,000. To protect Davis from being "dragged back into [the litigation]," Chapman also negotiated a settlement of Okemo's claims against USSCA in exchange for assignment of a (worthless) promissory note, TT Day 3 at 14-15;

- Chapman drafted both releases - - between Okemo and Davis, and between Okemo and USSCA - - using standard release forms and forwarded them to Coutant on February 6 and 9, 1995. TT Day 3 at 14-17, 25. Chapman testified that use of the word "agents" in the USSCA release, although already "in the form," was to protect Davis as president of USSCA, TT Day 3 at 25-26;

- Chapman further testified that Coutant stated during the release negotiations that Okemo still intended to

pursue its claims against Sikorski.[5] Coutant likewise testified that he told Chapman during negotiations that Okemo was going to pursue its claims against Sikorski in his individual capacity. TT Day 2 at 80. Chapman testified that his response was "what they did against Mr. Sikorski really was none of my business so long as I was assured that Mr. Davis was [sic] not somehow be dragged back into the case," TT Day 3 at 10;

- Coutant testified that "it was Okemo's intention, and my intention, and my understanding with Mr. Chapman, that this release did not apply to Mr. Sikorski for actions which he undertook on his own behalf as an individual not as an agent for USSCA," TT Day 1 at 45-46;

- Okemo proceeded to trial against Sikorski on the fraudulent inducement, double billing, and breach of covenant not to compete claims;

- Sikorski testified that, through contemporaneous conversations with Davis, he was aware of the settlement negotiations between Okemo and Davis, as well as Davis' and USSCA's payments to Okemo, but he did not participate in the discussions and did not seek discovery regarding the settlement. TT Day 4 at 45-53.[6]

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[5] Notably, this testimony clarifies a fact issue at odds with the Court of Appeals' finding in Okemo that Chapman "was not aware that Okemo proceeded to trial against Sikorski - - he assumed Okemo settled with all parties through release instruments." 376 F.3d at 105; see also TT Day 4 at 178-79.

[6] In addition to this testimony, it is important to note that at trial, Sikorski went to great lengths to show that Mueller and Okemo had a personal vendetta against him and hatched a plan to pursue him no matter what. If so, it would be surprising for them to so easily abandon

Nevertheless, it was entirely within the province of the jury to disbelieve certain witness testimony. But in order to do so and reach the conclusions the jury did, there must at least be some evidence to find that the parties intended to release Sikorski individually. To meet his burden[7] at trial in the face of the consistent testimony of those involved in negotiating and signing the release, Sikorski's counsel, Bradford Fawley ("Fawley"), attempted to show that before the release was signed, the fraudulent inducement claim was only pled and intended to be pled against Sikorski as an agent of USSCA, not based upon any individual actions of Sikorski. Further, Fawley's prevailing theory at trial challenged Judge Billings' decision by arguing that all damages were caused by Sikorski while Sikorski was acting as USSCA's agent. For instance:

- in his opening, Fawley stated: "We will prove that those alleged fraudulent acts were taken by Sikorski as agent of USSCA and, in fact, Okemo has admitted that," TT Day 1 at 38;

- in his opening, Fawley also stated that the 1995 case was "based on the very same acts, we will show, that he committed as agent for which they had just released him," TT Day 1 at 39;

- in his closing, Fawley alluded to the absence of individual actions by Sikorski by stating: "I can't remember a specific action Mr. Sikorski took as an individual." TT Day 5 at 39.

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their claims against Sikorski in his individual capacity by including him in the release for a relatively negligible sum.

[7] At all times it was Sikorski's burden to show by a preponderance of the evidence that he was included within the class of persons released. See Paper 257 at 12.

So, in reaching its conclusions, the jury necessarily relied on Fawley's presentation that the fraudulent inducement claim was not pled or intended to be pled as a claim against Sikorski in his individual capacity and potentially revisited Judge Billings' 1995 final judgment that Sikorski was liable for this claim in his individual capacity.

There are two primary reasons why these conclusions could not be reached by reasonable persons. For one, these findings completely ignore the undisputed fact that the portion of Okemo's 1993 complaint pertaining to the fraudulent inducement claim unequivocally stated: "As the direct and proximate result of the wrongful conduct of USSCA, Bob L. Davis, and Patrick J. Sikorski, each individually and in their representative capacity, Okemo has suffered substantial loss and damage." Paper 1 ¶ 119 (emphasis added). No later court filing narrowed the scope of this Count, and as memorialized in Judge Billings' decision and already found by this Court, although the case against Sikorski was initially based on Sikorski's actions as an individual and as an agent of USSCA, after the settlement with USSCA, the action proceeded to trial on Sikorski's behavior as an independent actor. The somewhat confused (and confusing) testimony of what Mueller may have understood or not understood about the nuances of individual versus agency liability does not, even when viewed in a light most favorable to Sikorski, change the fact that the lawsuit was initiated, maintained, and tried by Okemo against Sikorski in both his individual and representative capacities. Further, there is absolutely zero probative value to the fact that Okemo referred to Sikorski as an agent of USSCA in pleadings with the Court prior to the execution of the releases, considering that it is beyond question that one of Okemo's theories of liability against USSCA was premised upon agency law.

Second, to the extent the jury may have been influenced by Fawley's argument that all of Sikorski's

actions surrounding the fraudulent inducement claim were only actions taken as an agent, it was improper. In this regard, it should be remembered that in ruling upon motions prior to trial, the Court found Fawley's attempt to rekindle this exact defense to be "an impermissible collateral attack on the 1995 judgment" and barred by res judicata because "knowledge of the release does not change the fact that [Sikorski] could have argued at trial [in front of Judge Billings] the defense that he was acting as USSCA's agent." Paper 185 at 13. The Court again made this ruling clear to Sikorski and Fawley when it granted Okemo and Mueller's motion in limine "to exclude any efforts to show that Sikorski only acted as an agent of United States Sporting Clays Association and never acted in his individual capacity in connection with the 'game fairs'" because "such efforts would be an impermissible attack on the 1995 judgment." Paper 230 at 3.

2. Jury findings concerning fraud upon the court and estoppel

Similarly, the jury's findings as to fraud on the court and estoppel wilt under the glare of inspection because the court finds they are inextricably linked with the scope and intent of the release. In other words, the common thread in the fabric of this entire case is the notion that Okemo concealed a release that, because it covered Sikorski, would have provided Sikorski with a viable defense at the 1995 trial; and as the Court instructed the jury, Sikorski believes this "constitutes a fraud upon the court, fraudulent concealment, and fraudulent misrepresentation, as well as abuse of process in obtaining and pursuing the 1995 Judgment." Paper 257 at 2; see also id. at 17 (explaining that "[i]n deciding the question of estoppel, [jurors] will have to consider, among other things, the scope of the Release between Okemo and USSCA"). This interdependent relationship between the scope of the release on the one hand, and estoppel and fraud upon the

court on the other hand, has also been clearly acknowledged by Sikorski himself: "The jury has found, unequivocally, that Okemo through its lawyers committed fraud and fraud on the court, and is estopped to renew the judgment, because Okemo released Sikorski from the claims it then went ahead and tried against him, knowing it had released those claims." Paper 281 at 4 (emphasis added); see also id. at 4-5 (emphasizing that Intervenors have correctly observed that Sikorski's claim for fraud on the court is based upon the allegation that Okemo knew the release covered Sikorski).

Fraud upon the court, moreover, requires evidence of bad faith. See Transaero, Inc. v. La Fuerza Area Boliviana, 24 F.3d 457, 460-61 (2d Cir. 1994). Here, there is no evidence, much less clear and convincing evidence, of a fraudulent intent by Coutant at any point during this lengthy litigation, including in front of Judge Billings, the Connecticut bankruptcy court, and the Second Circuit. At best, the statements and surrounding circumstances relied upon by Sikorski to show fraud on the Court evidence lack of knowledge, failed memory or reasonable mistake. As to his understanding of the release, Coutant testified that he still "do[es] not believe we did pursue claims that were covered by the release," TT Day 2 at 131, and that he had a "clear conscience" on the matter. TT Day 2 at 63. The fact that Coutant readily turned over the release to Fawley and granted Fawley full access to his files supports his testimony. TT Day 2 at 121.

3. Jury findings concerning fraudulent concealment, fraudulent misrepresentation, and abuse of process

Because the findings concerning the release, fraud on the court, and estoppel cannot stand, the jury should never have addressed Sikorski's claims of fraudulent concealment, fraudulent misrepresentation, and abuse of

process. See Paper 255 (instructing the jury that answering "no" to the questions of release, fraud on the court, and estoppel necessitates by-passing question four of the Verdict Form, which addresses fraudulent concealment, fraudulent misrepresentation, and abuse of process).

4. Jury findings concerning IIED

In contrast to his other affirmative defenses and claims, Sikorski's claim of IIED is well-removed from the scope of the 1995 release. The IIED count was pled, not just based upon non-disclosure of a release that would have provided a defense at the 1995 trial, but also based upon Okemo's pursuit of Sikorski and overall aggressive litigation and post-judgment collection efforts. See Paper 128 at ¶¶ 1, 18 (Okemo has "for more than eight years directed their agents and attorneys to aggressively pursue collection of the judgment through legal process to identify and attach Sikorski's wages and assets"); see also Paper 255 (instructing that even if the jury answers "no" to the questions of release, fraud upon the court, and estoppel, the jury shall still proceed to answer the question of whether Okemo is liable to Sikorski for IIED).

Under Vermont law, the elements of IIED are (1) extreme and outrageous conduct, (2) done intentionally or with reckless disregard of the probability of causing emotional distress, (3) resulting in the suffering of extreme emotional distress, that is (4) actually or proximately caused by the outrageous conduct. See Fromson v. State, 176 Vt. 395, 399 (2004). A successful IIED claim must involve conduct "so outrageous as to surpass all possible bounds of decency, and . . . regarded as atrocious, and utterly intolerable in a civilized community." Gallipo v. City of Rutland, 163 Vt. 83, 94 (1994) (internal quotation marks and citations omitted). An IIED claim will not stand, however, if the relevant conduct consists of "mere insults, indignities, threats, annoyances, petty oppressions,

or other trivialities." Fromson, 176 Vt. at 399-400 (citing Restatement (Second) of Torts § 46 cmt. d).

Viewed in the light most favorable to Sikorski, the court finds there was sufficient evidence for a reasonable jury to conclude that Okemo's actions fell within the spectrum of intentional extreme and outrageous conduct such that it was liable for IIED. The evidence showed that Okemo pursued its claims and attempted to collect its judgment against Sikorski knowing that he was "judgment proof," i.e., that Sikorski "had no capacity to pay a judgment" and in fact, at the time was $300,000 in debt. TT Day 1 at pp. 108-17. Okemo then spent years hounding Sikorski, still knowing that he did not have the money required to fulfill the judgment. In so doing, Okemo obtained a twenty-five dollar per week levy on Sikorski's wages which negatively impacted his employment, attached certain money that did not belong to Sikorski (but in fact belonged to Sikorski's family and friends and was intended to fund Sikorski's fiftieth birthday party), and, upon learning that Sikorski's mother had been diagnosed with terminal cancer, engaged in a plan to monitor the Florida obituaries and local news so that Okemo would be one of the first to know when Sikorski's mother died in order to immediately seek proceeds from her estate. See e.g., TT Day 2 at 45-60, 185-87; TT Day 3 at 139-43. A reasonable jury could have found that this latter, somewhat morbid, conduct by Okemo offers at least one incident of behavior "that transcends the ignoble and vast realm of unpleasant" conduct that may be expected by an entity attempting to collect a judgment. Fromson, 176 Vt. at 400 (discussing how an IIED claim in the employment context must show at least one significant outrageous act). While the standard of establishing outrageous conduct is "necessarily a high one," Denton v. Chittenden Bank, 163 Vt. 62, 66 (1994), the facts of this case go beyond simply sending a demand letter for an amount beyond the recipient's means and refusing to settle. See Schwartz v. Frankenhoff, 169 Vt. 287, 299

(1999) (finding such conduct by creditors failed to state a claim for IIED). Instead, Okemo's motivation in pursuing Sikorski, the amount of time spent doing so, as well as the methods employed by Okemo, could reasonably be viewed by the jury as atrocious and intolerable in this society. It was also reasonable for the jury to conclude that Okemo intended to cause severe emotional distress to Sikorski, or at least acted in reckless disregard of that possibility, since Okemo believed Sikorski to be judgment proof. Finally, Sikorski's extreme suffering and causation is amply supported by his own testimony and the testimony of Patricia Healing, Cindy Rinfret, and Dr. Phillip Kinsler. TT Day 4 at 77-171.

In sum, the Court grants Okemo's motion for judgment as a matter of law as it relates to the jury findings of release, fraud on the Court, estoppel, fraudulent concealment, fraudulent misrepresentation, and abuse of process, but denies Okemo's motion as it relates to the jury's finding of IIED.

B. Okemo's and Intervenors' Alternative Motions for a New Trial (Papers 275, 279)

This Court's previous conclusions render Okemo's and Intervenors' alternative motions for a new trial under Fed. R. Civ. P. 59(a) moot, except as they relate to the jury's findings of IIED and damages in the amount of $650,000. As to liability, the alternative motions are denied because the jury has not reached a "seriously erroneous" result; nor could the verdict be viewed as against the weight of the evidence so as to be termed a "miscarriage of justice." See Manly v. Ambase Corp., 337 F.3d 237, 244-45 (2d Cir. 2003) (internal quotation marks and citations omitted). Quite frankly, the Court was shocked that Okemo even chose to pursue Sikorski knowing he was judgment proof, and with that knowledge, continued to pursue him in such a way

that can be characterized as systematic, drawn-out, and debasing.

As to the jury's award of $650,000 to Sikorski, it was necessarily based upon on all the jury's findings, not just the finding of IIED. Thus, this Court is unable to distinguish the valid amount of damages from the unsupported amount, necessitating a new trial on the sole issue of damages resulting from IIED. Additionally, the Court finds the jury verdict to be excessive in light of the rare circumstances of this case, including the fact that the Court, as discussed below, is vacating the 1995 judgment.

Before proceeding to another trial on damages though, the Court sua sponte suggests a remittitur which reduces the damage award from $650,000 to $250,000. See, e.g., Peterson v. County of Nassau, 995 F. Supp. 305, 312 (E.D.N.Y. 1998) ("A court may, sua sponte offer a remittitur as an alternative to a new trial."). Sikorski may accept such reduction by December 15, 2006, or proceed to a new trial on the issue of damages.

C. Sikorski's Motion for Equitable Relief
(Paper 251)

Sikorski's renewed motion for equitable relief from the 1995 Judgment is made pursuant to Fed. R. Civ. P. 60(b)(5) and (b)(6). Rule 60(b) provides:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reasons justifying relief

> from the operation of the judgment . . . . This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court.

This rule is a "grand reservoir of equitable power to do justice in a particular case," Marrero Pichardo v. Ashcroft, 374 F.3d 46, 55 (2d Cir. 2004) (quoting Matarese V. Lefevre, 801 F.2d 98, 106 (2d Cir. 1986)), and is designed to balance "the sanctity of final judgments" and the command "that justice be done in light of all facts." Paddington Partners v. Bouchard, 34 F.3d 1132, 1144 (2d Cir. 1994) (citing Bankers Mortgage Co. v. United States, 423 F.2d 73, 77 (5th Cir. 1970)). It has been often noted that Rule 60(b) "confers broad discretion on the trial court to grant relief when appropriate to accomplish justice." Id. Relief under Rule 60(b)(6), however, "should not be granted casually, but rather is properly invoked only where there are extraordinary circumstances justifying relief, when the judgment may work on extreme hardship, and when the asserted grounds for relief are not recognized in clauses (1)-(5) of the Rule." Stonewall Ins. Co. v. Nat'l Gypsum Co., 1992 WL 51567, at *6 (S.D.N.Y. Mar. 9, 1992). As in other instances when the trial court is afforded broad discretion, the trial court's decision is generally not reviewable on appeal absent a clear abuse of discretion. See Altman v. Connally, 456 F.2d 1114, 1116 (2d Cir. 1972).

The Court is aware that Rule 60(b)(6) motions are not, by any stretch, granted on a routine basis. As cogently explained by the Second Circuit:

> Very high among the interests in our jurisprudential system is that of finality of judgments. It has become almost a judicial commonplace to say that litigation

> must end somewhere, and we reiterate our firm belief that courts should not encourage the reopening of final judgments or casually permit the relitigation of litigated issues out of a friendliness to claims of unfortunate failures to put in one's best case.

United States v. Cirami, 563 F.2d 26, 33 (2d Cir. 1977). Nevertheless, the Court, intimately familiar with the byzantine nature of this litigation, concludes that it presents extraordinary circumstances which, when considered cumulatively, justify relief: (1) the case has gone on for 13 years and to date has involved 2 trials and an appeal – in Okemo's words, "[i]t would be hard to find a case with a more tangled and tortured procedural history," Paper 167 at 2; (2) even though the gaming event was not a success on paper, Okemo received considerable positive exposure, so much so that it desired to hold the event again the next year; (3) Mueller and Okemo knew Sikorski was "judgment proof" yet still pursued him fully, knowing he was not represented by an attorney, while settling with the deeper pocket defendants for a relatively small amount of money; (4) Sikorski represented himself at the first trial; (5) nearly a decade of collection efforts have yielded a paltry sum yet served to ruin Sikorski both financially and psychologically; and (6) a jury was persuaded Sikorski was entitled to damages from Okemo's wrongdoing.

Apart from the presence of extraordinary circumstances, the Court is convinced that the 1995 judgment has worked an extreme hardship on many, if not all of the people involved in this case. It has ruined Sikorski, impacted Sikorski's family members and those close to him, brought embarrassment to Okemo and Mueller, almost irreparably, yet undeservedly, tarnished the reputation of one of the members of this bar and his firm, and resulted in countless hours of useless collection efforts and further litigation. Admittedly, the 1995 judgment did hold a man accountable for his wrongful

actions. But Sikorski's actions do not come close to justifying the unenviable positions in which everyone involved in this litigation finds themselves today.

Accordingly, the Court exercises its equitable powers and grants Sikorski's Rule 60(b)(6) motion for equitable relief. In turn, the Court declines to renew and extend the 1995 Judgment for the additional eight-year period.

IV. Conclusion

For the reasons discussed above:

1. Okemo's motion for judgment as a matter of law, Paper 275, is GRANTED as to the jury's findings concerning the release, fraud, estoppel, fraudulent concealment, fraudulent misrepresentation, and abuse of process, and DENIED as to the jury's finding of IIED;

2. Intervenors' motion for judgment as a matter of law, Paper 279, is construed as a memorandum, thereby rendering the motion moot.

3. Okemo's and Intervenors' alternative motions for a new trial, Papers 275, 279, are GRANTED to the extent that a new trial is necessary to determine the appropriate amount of damages related to the IIED finding; and

4. As an alternative to a new trial, Sikorski shall have until December 15, 2006 to notify the Court whether he agrees to remit that portion of the jury award exceeding $250,000. Should Sikorski refuse to make such remittitur, this case shall be set for the January 2007 trial

calendar to determine the appropriate amount of damages.

Further, it is hereby ORDERED that:

1. Sikorski's renewed motion for equitable relief from the 1995 judgment, Paper 251, is GRANTED;

2. Okemo's request to renew the 1995 judgment is DENIED;

3. The 1995 judgment is VACATED in full; and

4. Okemo shall return any money collected thus far from Sikorski in partial fulfillment of the 1995 judgment.

SO ORDERED.

Dated at Brattleboro, Vermont, this 16th day of November, 2006.

/s/ J. Garvan Murtha
J. Garvan Murtha
United States District Judge

07-2314- cv(L)
Okemo Mountain, Inc. v. Sikorski,

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 19th day of December, two thousand eight.

PRESENT:

HON. JOSEPH M. McLAUGHLIN,
HON. DEBRA A. LIVINGSTON,
Circuit Judges,
HON. JOHN G. KOELTL,*
District Judge.

OKEMO MOUNTAIN, INC.,
Plaintiff-Counter-Defendant-Appellant-Cross-Appellee,

-v- Nos. 07-2314-cv (LEAD),
07-2316-cv (XAP)

PATRICK J. SIKORSKI,
Defendant-Counter-Claimant-Third-Party-Plaintiff-Appellee-Cross-Appellant,

UNITED STATES SPORTING CLAYS ASSOCIATION, BOB L. DAVIS, OVERSEAS SERVICES, INC., doing business as EXPEDITIONS,
Defendants-Counter-Claimants,

TIMOTHY T. MUELLER,
Third-Party-Defendant.

RICHARD COUTANT and SALMON & NOSTRAND,
Intervenors-Cross-Appellees.

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*The Honorable John G. Koeltl, District Judge for the Southern District of New York, sitting by designation.

MICHAEL F. HANLEY, Plante & Hanley, P.C., White River Junction, VT, *for Plaintiff-Counter-Defendant-Appellant-Cross Appellee.*

R. BRADFORD FAWLEY, Downs Rachlin Martin PLLC, Brattleboro, VT, *for Defendant-Counter-Claimant-Third-Party-Plaintiff-Appellee-Cross-Appellant.*

ROBERT B. HEMLEY (Norman Williams, *on brief*), Gravel and Shea, Burlington, VT, *for Intervenors-Cross-Appellees.*

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, and DECREED that the judgment of the district court is AFFIRMED in part and REVERSED in part, and that the appeal is DISMISSED in part.

Okemo Mountain, Inc. ("Okemo") appeals and Patrick J. Sikorski cross-appeals from the April 13, 2007 judgment (amended May 16, 2007) of the United States District Court for the District of Vermont (Murtha, J.), issued pursuant to the April 7, 2006 jury verdict on their civil suit and as modified by the district court's November 16, 2006 rulings on the parties' post-trial

motions. We assume the parties' familiarity with the underlying facts, procedural history, and specification of the issues on appeal.

Initially, we reject Sikorski's contention that Okemo waived its arguments regarding the proper interpretation of the release and Sikorski's claim of intentional infliction of emotional distress ("IIED") by failing to object to jury instructions on those issues. The focus of Okemo's arguments is not the jury instructions themselves, but the district court's rulings on Okemo's Rule 50(b) motions. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 120 (1988). "Although the same legal issue[s were] raised both by those motions and by the jury instruction[s], 'the failure to object to an instruction does not render the instruction the "law of the case" for purposes of appellate review of the denial of a directed verdict or judgment notwithstanding the verdict.'" *Id.* (quoting *Springfield v. Kibbe*, 480 U.S. 257, 264 (1987) (O'Connor, J., dissenting)).

When evaluating a district court's decision on a motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b), this Court reviews the decision *de novo*, regardless of whether the district court granted the motion, *see, e.g., O & G Indus., Inc. v. Nat'l R.R. Passenger Corp.*, 537 F.3d 153, 163 (2d Cir. 2008), or denied it, *see e.g., Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 226-27 (2d Cir. 2006). In this inquiry, we apply the same standard as the district court was required to apply. *Chartschlaa v. Nationwide Mut. Ins. Co.*, 538 F.3d 116, 121-22 (2d Cir. 2008). Therefore, we "consider the evidence in the light most favorable to the non-moving party and give that party the benefit of all reasonable inferences from the evidence that the jury might have drawn in that party's favor." *Id.* At 122 (internal quotation marks omitted) (quoting *Diesel v. Town of Lewisboro*, 232 F.3d 92, 103 (2d Cir. 2000)). A motion for judgment as a matter of law may properly be granted "[o]nly if there is 'such a complete absence of evidence supporting the verdict that the jury's

findings could only have been the result of sheer surmise and conjecture, or such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against [the moving party].'" *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 429 (2d Cir. 1995) (second alteration in original) (quoting *Song v. Ives Labs., Inc.*, 957 F.2d 1041, 1046 (2d Cir. 1992)).

We agree with the district court that Okemo satisfied this weighty burden with respect to its motion for judgment as a matter of law that the release did not cover the fraudulent inducement action brought against Sikorski in his individual capacity. Because this Court previously determined that the language of the release was ambiguous, *see Okemo Mountain, Inc. v. U.S. Sporting Clays Ass'n*, 376 F.3d 102, 105 (2d Cir. 2004), Sikorski may not rely on the language of the release alone to support the jury's verdict. Yet Sikorski is unable to point to additional evidence that sheds light on the proper interpretation of the release without impermissibly attacking the 1995 judgment holding him liable individually for fraudulent inducement. It is of no probative value that Okemo asserted separate agency claims against the United States Sporting Clays Association ("USSCA") based on actions it alleged Sikorski took on the USSCA's behalf, and that Stacy Chapman wanted the release to fully resolve all claims against the USSCA and its agents. Nor is there any basis for interpreting the release as distinguishing between the fraudulent inducement claim and the "wholly 'individual' claims of double billing and breach of contract." Sikorski's Reply to Okemo's & Intervenors' Opp'n Brs. 8. The language of the release fails to draw such a distinction, and the latter claims are not so unrelated to the USSCA as Sikorski implies. *Cf., e.g.*, Okemo's Am. Compl. 35, Jan. 22, 1993 (alleging that "Patrick J. Sikorski, *acting as agent and employee of USSCA*, employed the practice of 'double billing'" (emphasis added)).

The claims on which the district court granted Okemo's Rule 50(b) motions were each premised upon the jury's finding that the release in fact covered the fraudulent inducement claim against Sikorski individually. Because we agree with the district court that the evidence fails as a matter of law to support this interpretation of the release, we affirm the district court's decision to grant these motions.

Turning to Okemo's argument that the district court should have granted it judgment as a matter of law on Sikorski's IIED claim, we apply the substantive law of Vermont to assess the evidence submitted in support of that claim. According to the Supreme Court of Vermont, "[t]o sustain a claim for IIED plaintiff must show defendant[ ] engaged in 'outrageous conduct, done intentionally or with reckless disregard of the probability of causing emotional distress, resulting in the suffering of extreme emotional distress, actually or proximately caused by the outrageous conduct.'" *Fromson v. State*, 848 A.2d 344, 347 (Vt. 2004) (quoting *Sheltra v. Smith*, 392 A.2d 431, 433 (Vt. 1978)). To qualify as outrageous conduct, a defendant's actions must be "'so extreme in degree as to go beyond all possible bounds of decent and tolerable conduct in a civilized community and be regarded as atrocious and utterly intolerable.'" *Id.* (quoting *Dulude v. Fletcher Allen Health Care, Inc.*, 807 A.2d 390, 398 (Vt. 2002)). The test for outrageousness is an objective one, *Baldwin v. Upper Valley Servs., Inc.*, 644 A.2d 316, 319 (Vt. 1994), and "[a]bsent at least one incident of behavior that transcends the ignoble and vast realm of unpleasant and often stressful conduct ..., incidents that are themselves insignificant should not be consolidated to arrive at the conclusion that the overall conduct was outrageous." *Denton v. Chittenden Bank*, 655 A.2d 703, 706 (Vt. 1994); *accord Dulude*, 807 A.2d at 399.

Applying these standards, we disagree with the district court and conclude that Okemo was entitled to

judgment as a matter of law with respect to Sikorski's IIED claim. Assuming that Okemo's plan to attach the estate of Sikorski's terminally ill mother was sufficiently outrageous to satisfy the IIED standard, there is no evidence that Sikorski was aware of this plan prior to trial, *see* Trial Tr. 150:6-13, Apr. 5, 2006, which forecloses the possibility that the plan actually or proximately caused Sikorski distress. The only other event that arguably might be outrageous enough to satisfy Vermont's IIED standard would be Okemo's attachment of the bank account containing funds provided by Sikorski's family and friends to pay for Sikorski's fiftieth birthday celebration. However, the bank account was apparently in Sikorski's name, *see id.* at 142:1-11, and there is no evidence that Okemo was aware of the funds' purpose or ownership when it attached the account. Therefore, Sikorski cannot show that Okemo attached the bank account "intentionally or with reckless disregard of the probability of causing emotional distress." *Fromson*, 848 A.2d at 347 (internal quotation marks omitted) (quoting *Sheltra*, 392 A.2d at 433). Because there are no other incidents that might be sufficiently outrageous to support Sikorski's IIED claim, we reverse the district court's denial of Okemo's motion for judgment as a matter of law on the IIED claim, and we remand to the district court with instructions to vacate the award entered in Sikorski's favor on that claim. We dismiss as moot Okemo's appeal of the district court's decision to grant a remittitur to Sikorski.

We disagree with the district court's decision to vacate the 1995 judgment against Sikorski and find that it was an abuse of discretion to do so. There was no basis under rule 60 to vacate the judgment when the district court found that there had been no fraud, and no other exceptional circumstances existed. On the other hand, at oral argument, counsel for Okemo agreed that if the 1995 judgment were not vacated and this Court found in Okemo's favor on the IIED claim, Okemo would no longer

seek to renew its 1995 judgment against Sikorski. Because we have concluded that the 1995 judgment should not have been vacated and that Okemo was entitled to judgment as a matter of law on the IIED claim, we therefore dismiss Okemo's challenge to the district court's refusal to renew the 1995 judgment. All arguments not otherwise discussed in this summary order are found to be either moot or without merit.

For the foregoing reasons, the judgment of the district court is hereby affirmed as to the Rule 50(b) motions that the district court granted to Okemo. The judgment is reversed as to the district court's denial of Okemo's 50(b) motion on Sikorski's IIED claim and remanded with instructions to the district court to vacate the monetary award entered in Sikorski's favor on this claim. Okemo's appeal of the decision to grant Sikorski remittitur is dismissed as moot. The district court's decision vacating the 1995 judgment is reversed and remanded, and Okemo's appeal from the district court's decision refusing to renew the 1995 judgment is dismissed as moot.

FOR THE COURT:
Catherine O'Hagan
Wolfe, Clerk

By: /S/ Franklin Perez

A TRUE COPY
Catherine O'Hagan
Wolfe, Clerk

by /s/ Anna [ ]
DEPUTY CLERK

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 17th day of March, two thousand and nine.

Okemo Mountain, Inc.,

Plaintiff-Counter-Defendant-Appellant-Cross-Appellee,

ORDER

v. Docket Number: 07-2314-cv(L)
07-2316-cv(XAP)

Patrick J. Sikorski,

Defendant-Counter-Claimant-Third-Party-Plaintiff-Appellee-Cross-Appellant,

United States Sporting Clays Association, Bob L. Davis, Overseas Services, Inc., doing business as Expeditions,

Defendant-Counter-Claimants,

Timothy T. Mueller,

Third-Party-Defendant,

Richard Coutant and Salmon & Nostrand,

Intervenors-Cross-Appellees.

Appellee Patrick J. Sikorski having filed a petition for

panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe,
Clerk

By: /s/ Franklin Perez
Frank Perez, Deputy Clerk

GENERAL RELEASE

TO ALL TO WHOM THESE PRESENTS SHALL COME OR MAY CONCERN:

GREETING: KNOW YE, That

OKEMO MOUNTAIN, INC.,

For and in consideration of the sum of One Dollar and Other Valuable Consideration lawful money of the United States of America to it in hand paid by

UNITED STATES SPORTING CLAYS ASSOCIATION,

The receipt whereof is hereby acknowledged, has remised, released and forever discharged, and by these presents does for itself, its officers, agents, employees, attorneys, successors and assigns, remise, release and forever discharge the said

UNITED STATES SPORTING CLAYS ASSOCIATION,

Its officers, agents, employees, attorneys, successors and assigns, of and from all, and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckoning, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law or in equity, which against the said

UNITED STATES SPORTING CLAYS ASSOCIATION,

Its officers, agents, employees, attorneys, successors and assigns, it ever had, now has or which its officers, agents, employees, attorneys, successors and assigns has or may have for, upon or by reason of any matter, cause or thing

whatsoever from the beginning of the world to the day of the date of these presents.

And more particularly but without limiting the generality of the foregoing has remised, released and forever discharged the said United States Sporting Clays Association from all claims arising out of a suit brought in the United States District Court for the District of Vermont, Civil Action, Docket No. 5:93-cv-22 and captioned: "OKEMO MOUNTAIN, INC. V. UNITED STATES SPORTING CLAYS ASSOCIATION, BOB L. DAVIS, PATRICK SIKORSKI and OVERSEAS SERVICES, INC. d/b/a EXPEDITIONS".

IN WITNESS WHEREOF, I have hereunto set my hand and seal the 23rd day of February in the year Nineteen Hundred and Ninety-Five.

IN PRESENCE OF:

OKEMO MOUNTAIN, INC.

s/ Donald E. [ ] BY: s/Timothy Mueller
First Witness Its Duly Authorized Agent

s/ [ ]
Second Witness

STATE OF VERMONT

WINDSOR COUNTY, SS. On this the 23 day of February, 1995 before me, Barbara Johnston, the undersigned officer, personally appeared Timothy Mueller, Duly Authorized Agent of Okemo Mountain, Inc., known to me (or satisfactorily proven) to be the person whose name subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

s/ Barbara Johnson
Notary Public

My Commission Expires: 2/10/99

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

OKEMO MOUNTAIN, INC., Plaintiff and Counter-Defendant,	:	
v.	:	
PATRICK J. SIKORSKI, Defendant, Counter-Claimant.	:	File No. 1:93-cv-22

VERDICT FORM

1. Considering all the facts and circumstances surrounding its execution, do you find that the February 23, 1995 General Release was intended to release the fraudulent inducement claim by Okemo against Mr. Sikorski?

   Yes ___√___ No _____

2. Do you find that Mr. Sikorski has proved by clear and convincing evidence that Okemo, through its attorney, committed fraud upon the court in seeking, obtaining, maintaining, executing, or renewing the 1995 Judgment against Mr. Sikorski?

   Yes ___√___ No _____

3. Was Okemo estopped from seeking, obtaining, maintaining, or executing the 1995 Judgment, and is Okemo estopped from renewing the Judgment against Mr. Sikorski?

Yes ___√___ No _____

If you answered "Yes" to any of Questions 1, 2, and 3, please proceed to Questions 4 and 5. If you answered "No" to all of Questions 1, 2, and 3, leave Question 4 blank and proceed to Question 5.

4. a. Do you find that Mr. Sikorski has proved by clear and convincing evidence that Okemo is liable to Mr. Sikorski for the following claims:

Fraudulent Concealment?
Yes ___√___ No _____

Fraudulent Misrepresentation?
Yes ___√___ No _____

b. Do you find that Mr. Sikorski has proved by a preponderance of the evidence that Okemo is liable to Mr. Sikorski for:

Abuse of Process?
Yes ___√___ No _____

5. Do you find that Mr. Sikorski has proved by a preponderance of the evidence that Okemo is liable to Mr. Sikorski for intentional infliction of emotional distress?

Yes ___√___ No _____

If you answered "No" to all parts of Questions 4 and 5, stop here. Your deliberations are done; please sign and date the verdict form at bottom.

If you answered "Yes" to any part of Questions 4 and 5, please proceed to Questions 6.

6. Do you find that Mr. Sikorski has proved by a preponderance of the evidence that he should be awarded compensatory damages for any effects he suffered because of Okemo's wrongdoing?

Yes √ No _____

If your answer is "yes," in what amount? $650,000.00

Please proceed to Question 7.

7. Do you find Okemo liable to Mr. Sikorski for punitive damages?

Yes _____ No √

s/ Jury Foreperson
Foreperson
4/7/06
Date

3098685